Supreme Court of the United States

October Term, 1956

No. 445

In the Matter
of the
Petition of LAKE TANKERS CORPORATION,
Petitioner,
for exoneration from or limitation of liability.

LILLIAN M. HENN, Administratrix,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Lake Tankers Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 13, 1956, in this proceeding by a shipowner for limitation of liability under the Act of March 3, 1851.

Citations to Opinions Below

The opinion of the Court of Appeals is reported at 232 F. 2d 573. It is printed in the Appendix, *infra* page 15, *et seq.* and at page 91a of the record. Its memorandum inviting additional briefs for the re-hearing *in banc* is not reported. It is printed in the Appendix *infra* page 29, and at page 128a of the record. Its *per curiam* opinion granting the petition for re-hearing *in banc* and adhering to its

original decision is not yet reported. It is printed in the Appendix, *infra* page 30, and at page 173a of the record.

The opinion of Ryan, J. in the District Court is reported only at 1955 A. M. C. 55. It is at page 26a of the record. The first and second opinions of Weinfeld, J. are reported at 132 F. Supp. 504 and 137 F. Supp. 211. They are at page 35a and page 57a of the record.

Jurisdiction

The judgment of the Court of Appeals was entered on April 13, 1956 (R. 106a). The petition for re-hearing *in banc* was granted and the original decision adhered to on August 21, 1956 (R. 175a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Question Presented

Is the owner of a tug and barge entitled to maintain a proceeding for limitation of liability and to obtain a *concursus* and one decision, binding upon all parties as to the issues of liability, amount of the limitation fund and the amounts to be recovered by the several claimants, when it is confronted with eleven death, personal injury and loss of property claims, the aggregate of which is greater than the amount of its limitation fund as may be determined after trial?

Statute Involved

The applicable sections of the limitation statute are 46 U. S. Code §§ 183(a), 184, 185. They are printed in the Appendix hereto, *infra* page 32. Subsection (b) and the ensuing subsections of Section 183 provide for the statutory fund of $60 per ton but are limited to "seagoing" vessels and are not applicable here and are not reprinted.

Rules Involved

The applicable rules are United States Supreme Court Admiralty Rules 51, 52, 53, 54. The pertinent sections are reprinted in the Appendix hereto, *infra* page 33.

Statement

During the night of July 9-10, 1954 petitioner's barge No. 38, in tow of petitioner's tug EASTERN CITIES, was in collision, in the Hudson River, with the yacht BLACKSTONE, which capsized. Ten of her eleven passengers were rescued but respondent's husband has not reappeared. She began an action at law in the State Court against petitioner to recover $500,000 for the death. Other actions against petitioner by the survivors claimed $157,500 and petitioner accordingly filed its petition for exoneration from or limitation of liability.

An *interim* stipulation was given for $118,542.21, the value of the tug. The barge was without power and wholly controlled by the tug; hence it was thought that a stipulation for the tug's value was enough. *Liverpool etc. Nav. Co.* v. *Brooklyn Eastern District Terminal,* 251 U. S. 48, 53; *The Transfer No. 21,* 248 Fed. 459, 461 (2 Cir.). Nevertheless petitioner offered to give such further *interim* stipulation as the Court might require (R. 7a). The Court approved the *interim* stipulation as given and issued the usual restraining order enjoining the prosecution of the actions at law.

Upon respondent's motion to dismiss the petition for insufficient *interim* security the Court required petitioner to give an *interim* stipulation for the barge also. *Petition of Lake Tankers Corp.,* 1955 A. M. C. 55 (not reported elsewhere; R. 26a). Petitioner then filed an additional *interim* stipulation for $165,000, the value of the barge. Thereafter respondent filed her claim for $250,000. Claims were

also filed by the ten survivors aggregating $9,525. The total was $259,525, more than the value of either the tug or barge but less than the value of both.

Appellee then moved to vacate the restraining order so that she might proceed with her action at law, asserting that the claims aggregated less than the limitation fund, relying upon *Petition of Texas Company,* 213 F. 2d 479 (2 Cir.), certiorari denied, 348 U. S. 829. The argument was that the limitation fund was $283,542.21, the sum of the two *interim* stipulations, and the claims were only $259,525. Weinfeld, J., denied the motion holding that the amount of the fund, as distinguished from the sum of the two *interim* stipulations, could not be determined until after trial because the fund will consist of the value only of the vessel(s) at fault *in rem.* Only if both vessels are individually at fault *in rem* will the value of both go into the fund. This is settled law. *Liverpool etc. Nav. Co.* v. *Brooklyn Eastern District Terminal,* 251 U. S. 48; *The Transfer No. 21,* 248 Fed. 459 (C. A. 2); *Standard Dredging Co.* v. *Kristiansen,* 67 F. 2d 548 (C. A. 2), certiorari denied 290 U. S. 704; *Harbor Towing Corp.* v. *Atlantic Mutual Insurance Company,* 189 F. 2d 409 (C. A. 4). The judge therefore held that the premise underlying respondent's motion, i.e., that the fund exceeded the claims, was false, and denied the motion. *Petition of Lake Tankers Corp.,* 132 F. Supp. 504 (R. 35a). However, in his opinion he suggested that respondent could escape from the limitation proceeding if she would apportion her claim against tug and barge and bring the amount of the claims against each vessel to less than its value. Respondent followed this suggestion and filed a stipulation purporting to allocate her claim as between tug and barge, but her claim against petitioner remained the same, $250,000. The claims were then, and still are, as follows:

	In this proceeding	*In pending actions at law*
Respondent		
allocated to tug	$100,000	
allocated to barge	150,000	
against petitioner	250,000	$500,000
Not allocated as between tug and barge:		
Roan	4,400	32,500
Carlson	3,000	50,000
Cruz	225	25,000
Strong	1,600	50,000
Van Wart	50	
Hughes	50	
McNutt	50	
Raymond	50	
Cady	50	
Ratledge	50	
Total	$259,525	$657,500

The aggregate of claims against petitioner in this proceeding is $259,525. The eventual limitation fund, as distinguished from the *interim* security, will only exceed the claims if both vessels are held at fault. If only one is held at fault the fund will not be adequate and a concourse will be necessary to distribute it pro rata. Which vessel was at fault, or whether both were, cannot be determined until after trial.

Whether or not the fund proves to be adequate, the eleven claims against petitioner arise out of the same occurrence and turn upon the same facts and law. A concourse will permit their decision in one proceeding the result of which will be binding upon them vis-a-vis petitioner and also among themselves. The latter is an essential consideration if the fund should be inadequate.

Nevertheless, after apportioning her claim, respondent again moved to vacate the restraining order, this time on

the ground that the claims against each vessel were less than its value. Weinfeld, J., granted this motion, holding that there are two funds, each more than the claims against it. *Petition of Lake Tankers Corporation,* 137 F. Supp. 311 (R. 57a).

On appeal a divided Court affirmed, holding that concourse will be granted only when necessary to distribute an inadequate fund, that this single proceeding, by a single petitioner, must be regarded as if it were two separate proceedings because two vessels are involved, and that, since the claims allocated to each vessel are less than her value, respondent can not be held in the concourse of the limitation proceeding. (R. 96a).

In a strong dissent, Hincks, C. J., held that this single proceeding, by a single petitioner, cannot be regarded as if it were two; that since the claims against petitioner exceed the possible fund the Admiralty Court must keep them all in the limitation proceeding and that the prosecution of respondent's action at law will be "wholly fruitless and nugatory" (R. 103a).

Petitioner filed a petition for a re-hearing *in banc.* After four months the Court filed its *per curiam* opinion granting the petition for re-hearing *in banc* but adhering to its original decision. No reasons for the decision were stated. Judges Clark, Frank, Lumbard and Waterman concurred, Judges Medina and Hincks dissented.

REASONS FOR GRANTING THE WRIT

I. The Court construed the statute contrary to the rule established by this Court.

The majority below predicated its decision wholly upon the view that it "must" regard this single proceeding as if it were two (*infra* p. 20). There is no such compulsion in the statute, the Admiralty Rules, or in precedent.

In fact there is only one proceeding, only one petitioner. After a trial on the allegations of fault against tug and barge, if liability is found there will be only one limitation fund, paid into court by petitioner. Because there are two *interim* stipulations does not mean that there are two proceedings. In numerous cases the courts have dealt with single limitation proceedings by the owners of two or more vessels without finding it necessary to proceed as if there were two. *United States* v. *The Australia Star*, 172 F. 2d 472 (2 Cir.); *Standard Dredging Co.* v. *Kristiansen*, 67 F. 2d 548 (2 Cir.); *The Transfer No. 21*, 248 Fed. 459 (2 Cir.); *The Bordentown*, 40 Fed. 682 (S. D. N. Y.); *The Captain Jack*, 169 Fed. 455 (D. C. Conn.); *The Alvah H. Boushell*, 38 F. 2d 980 (4 Cir.); *Thompson Towing & Wrecking Ass'n* v. *McGregor*, 207 Fed. 209 (6 Cir.); *The Columbia*, 73 Fed. 226 (9 Cir).

To construe the statute narrowly and grudgingly, as the Court did, is contrary to the rule, thoroughly established by this Court, that the statute is to be construed liberally for the benefit of shipowners. *Norwich Company* v. *Wright*, 13 Wall (80 U. S.) 104, 121; *Providence & N. Y. S.S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 588-9; *Butler* v. *Boston and Savannah Steamship Co.*, 130 U. S. 527, 550-1; *Hartford Accident and Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 214-16; *Flink* v. *Paladini*, 279 U. S. 59, 62-3; *Larsen* v. *Northland Transportation Co.*, 292 U. S. 20, 24; *Just* v. *Chambers*, 312 U. S. 383, 385; *Coryell* v. *Phipps*, 317 U. S. 406, 411; *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 414.

This Court has consistently adopted a broad rather than a restrictive interpretation of the statute. As the Court pointed out in *Butler* v. *Boston and Savannah Steamship Co.*, 130 U. S. 527, 550, it was at first contended that the Act did not apply to collisions but this "pretence" was rejected in *Norwich Company* v. *Wright*, 13 Wall (80 U. S.) 104. It was next insisted that the Act did

not extend to loss by fire but this restrictive view was rejected in *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578. In the *Butler* case the claim was that the Act did not extend to claims for personal injury and death, but again this Court rejected the narrow construction. In 1881 this Court held that, although the Act did not so provide expressly, it could be invoked by a British shipowner in the case of a collision on the high seas between his vessel and an American vessel. *The Scotland*, 105 U. S. 24. Years later this Court held that the Act could be invoked by a British shipowner in respect of a disaster suffered by a British ship on the high seas where no American vessel was involved, although it had many times said in earlier years that the principal purpose of the Act was to put American shipowners on a parity with foreign shipowners. *The Titanic*, 233 U. S. 718. Indeed, this Court has long since construed the Act broadly to hold that it is not limited to maritime torts, *Richardson* v. *Harmon*, 222 U. S. 96, and that it may be availed of by one who is only a stockholder of a corporate shipowner, *Flink* v. *Paladini*, 279 U. S. 59.

In recent years there has been a gradual whittling away of the limitation statute by courts seemingly out of sympathy with the Congressional purpose. But the Congressional purpose has not been changed since the statute was originally enacted in 1851. Following the MORRO CASTLE disaster in 1934 the Congress held extensive hearings and reviewed the matter thoroughly. The statute was not repealed. It was modified somewhat, on points that do not touch the problem here, and reaffirmed. See Mr. Justice Frankfurter's review of the 1936 amendments to the statute in *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 414-417.

The decision below frustrates the reaffirmed Congressional purpose and is a giant step toward the judicial repeal of the statute.

II. The Court denied petitioner a *concursus*, contrary to the decisions of this Court.

Petitioner is confronted with eleven claims arising out of this collision. This Court has held that a *concursus* is the heart of the limited liability statutes, and that the limitation proceeding is like a bill in equity to enjoin a multiplicity of suits, looking to a complete disposition of a many cornered controversy. *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 415; *Hartford Accident and Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 216; *Butler* v. *Boston and Savannah Steamship Co.*, 130 *U. S.* 527, 552; *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 595-8; *The Scotland*, 105 U. S. 24, 33; *Ex Parte Slayton*, 105 U. S. 451, 452; *Just* v. *Chambers*, 312 U. S. 383, 385-6.

The decision below requires petitioner to litigate respondent's claim in her action at law outside the limitation proceeding. As it appears at the moment the other ten claims will be heard in the limitation proceeding. However, if the decision below is not reversed it is almost certain that the other ten will ask and obtain leave to proceed with their actions at law also. If the restraining order is vacated to allow respondent to proceed separately there is no reason why it should not be vacated for the others. In that event there will have to be eleven trials and the purpose of the limitation statute will have been wholly defeated.

The Court did not put its decision on the ground that no *concursus* will be necessary. The Court has evolved a "rule" that claimants in a limitation proceeding may have the restraining order vacated, and may proceed with their separate actions in other courts, if, even after jurisdiction has been taken because the claims exceed the fund, they, by concerted action among themselves for the obvious purpose of defeating jurisdiction, reduce their claims to an aggregate figure just below the probable fund. *Petition of Texas Company*, 213 F. 2d 479 (2 Cir.). Here the

eleven claims as filed in this proceeding aggregate $259,500 and as filed in pending State court actions aggregate $657,500, yet petitioner's limitation fund will not exceed $118,500, the value of the tug, unless somehow the barge, without motive power and wholly under the control of the tug, is also held at fault.

But the Second Circuit's "rule" that an inadequate fund is a prerequisite to maintaining a limitation proceeding is at odds with several decisions of this Court. Admiralty Rule 53 permits the petitioner to contest his liability. If he does so successfully there will be no fund because there is no liability. Nevertheless the proceeding may be maintained. *Butler* v. *Boston and Savannah Steamship Co., supra,* 130 U. S. 527, 552; *Hartford Accident and Indemnity Co.* v. *Southern Pacific Co., supra,* 273 U. S. 207, 215. In the converse situation, where there is liability but without limitation, i.e., there is not an inadequate fund to distribute, this Court has held that the Admiralty Court has both the *power* and the *duty* to continue the proceeding. *Hartford Accident and Indemnity Co.* v. *Southern Pacific Co., supra,* 273 U. S. 207, 220; *Just* v. *Chambers,* 312 U. S. 383; *Spencer Kellogg & Sons, Inc.* v. *Hicks,* 285 U. S. 502, 512.

In *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co., supra,* 109 U. S. 578, this Court assumed a situation where, due to the total loss of the vessel and the absence of freight money, there is no fund, yet held that the proceeding could be maintained. Later this situation actually arose and the proceeding was sustained. *Petition of Wood* (*The Susan*), 124 F. Supp. 540. So also where, after trial, the petitioner is held liable and granted the right to limitation but the claims prove to be less than the fund. The proceeding is not dismissed but the Court pays the claimants out of the fund and repays the balance to the petitioner. *Briggs* v. *Day,* 21 Fed. 727. Compare *The George W. Fields,* 237 Fed. 403; *The Tug No. 16,* 237 Fed. 405.

Except for the recent decisions in the Second Circuit just referred to there is no rule that an inadequate fund is a prerequisite to the maintenance of a limitation proceeding. The only prerequisite in the decisions of this Court has been the existence of multiple claims and a reasonable apprehension that they will exceed the value of petitioner's interest in his vessel. Both conditions are fulfilled here. When petitioner began this proceeding actions at law had been begun against it aggregating $657,500. Since the value of its interest in both vessels and their pending freight was less than $300,000 petitioner was eminently justified in filing its petition and claiming the benefits of the statute. Jurisdictional facts then being present, the Admiralty Court unquestionably obtained jurisdiction. The effect of the reduction of the claims, and the allocation of respondent's claim between tug and barge, has been, as the matter stands on the decision below, to deprive the Admiralty Court of jurisdiction which had previously and properly attached. This is directly contrary to the rule laid down by this Court in diversity cases. In such cases this Court has held that if the claim exceeds $3,000, jurisdiction attaches and a subsequent reduction in amount will not deprive the Court of jurisdiction. *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283. Any other decision would place the Court's jurisdiction at the whim of plaintiffs' attorneys; an unseemly situation.

Such "procedural manoeuvring" was not allowed in *Petition of Boraks*, 142 F. Supp. 364.

III. The delegation to a State Court of the determination of a vessel's liability *in rem* is nugatory.

The Federal Court sitting in Admiralty has exclusive jurisdiction of all questions affecting the limitation of liability. *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578; *In re Morrison*, 147 U. S. 14; *The San Pedro*, 223 U. S. 365; *Hartford Accident and Indemnity Company*

v. *Southern Pacific Co., supra,* 273 U. S. 207; *Langnes* v. *Green,* 282 U. S. 531; *Ex Parte Green,* 286 U. S. 437.

The amount of the limitation fund is a matter exclusively for the Admiralty Court. *Petition of Red Star Barge Line,* 160 F. 2d 436 (2 Cir.); *W. E. Hedger Transp. Corp.* v. *Gallotta,* 145 F. 2d 870 (2 Cir.); *The Norco,* 66 F. 2d 651 (9 Cir.); *Petition of McAllister Bros.,* 96 F. Supp. 575; *The Kearny,* 3 F. Supp. 718.

The Admiralty Court alone has the power to determine the liability of a vessel *in rem.* The State Court is not competent to adjudicate *in rem* liabilities. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 216; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 160; *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109. Whether the fund shall consist of the value of the tug, or the barge, or both will turn upon whether either or both is at fault *in rem. Liverpool etc. Nav. Co.* v. *Brooklyn Eastern District Terminal, supra,* 251 U. S. 48; *The Transfer No. 21,* 248 Fed. 459 (2 Cir.). Necessarily, therefore, only the Admiralty Court has jurisdiction to adjudicate the charges of fault against tug and barge. This being so, the prosecution of respondent's action at law must be wholly nugatory.

The procedure of special verdict visualized by the court below could have no binding effect. Suppose the State Court were to hold both tug and barge, fix their aggregate value at $283,000, and fix appellee's damages at $250,000. But suppose also that in the limitation proceeding the Admiralty Court, finding only the tug at fault, enters a decree allowing petitioner to limit its liability to the tug's value, $118,000. Which result prevails; what then is the limit of petitioner's liability? The Admiralty Court will then fix the tug's value as the limitation fund and perpetually enjoin all persons, including appellee, from proceeding against petitioner otherwise than against that fund. The State Court's decision that liability flows from some fault in respect of the barge as well, and its judgment

for more than the amount the Admiralty Court fixes as the limit of petitioner's liability cannot possibly stand.

Suppose the State Court holds only the tug and values her at $118,000, but in the limitation proceeding the Admiralty Court holds both tug and barge. Petitioner has not waived any right to claim *res judicata* as to the decisions of the State Court. In this situation the Federal Court fund would be $283,000. The other claimants would collect a maximum of $9,525 and petitioner would have to pay appellee only $118,000 although her damages are $250,000 and there remained $155,475 in the Admiralty Court fund.

For a third possibility, suppose the Admiralty Court holds petitioner not liable but the State Court finds liability. Upon a finding of no liability the Admiralty Court will enter the usual decree of exoneration which incorporates a perpetual restraining order forbidding the prosecution of any and all claims against petitioner arising out of this incident. Either this would prevent appellee from collecting any judgment entered on the State Court's finding of liability, rendering the whole State Court proceedings fruitless, or, if the State Court judgment were collected it would be in contempt of the Admiralty Court's decree and in violation of the mandate of the limitation statute.

Only hopeless confusion can result from allowing respondent to proceed separately. Whatever the State Court decides as to the liabilities as between petitioner and respondent, the other ten claimants will not be bound; nor will petitioner be bound as to them. This will necessitate at least another trial of all the issues in the limitation proceeding and if, as petitioner expects, the other ten ask and obtain leave to proceed separately, ten other trials. These could easily result in several varying decisions as to liability the sum of which can readily exceed the value of the vessels.

Concursus is at the heart of the matter and this is plainly a case where *concursus* is both desirable and neces-

sary. Petitioner has complied with the requirements of the statute and the Admiralty Rules and is entitled to *concursus*.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE UNDERWOOD,
Counsel for Petitioner.

New York, N. Y.,
September 21, 1956.

Appendix

(Opinion of United States Court of Appeals, For the Second Circuit, on Appeal From Order)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 268—October Term, 1955.

(Argued February 17, 1956 Decided April 13, 1956.)

Docket No. 23965

In the Matter

of the

Petition of Lake Tankers Corporation for Exoneration from or Limitation of Liability.

Before:

CLARK, FRANK and HINCKS,

Circuit Judges.

Appeal from an order, of the United States District Court for the Southern District of New York, entered by Judge Weinfeld. Modified and Affirmed as modified.

BURLINGHAM, HUPPER & KENNEDY (New York, New York), *Proctors for Petitioner.*

ROSEN & ROSEN, *Proctors for Claimant-Appellee.*

On July 10, 1954 the yacht Blackstone was proceeding down the Hudson River. Petitioner's tug, Eastern Cities,

push-towing petitioner's barge L. T. C. No. 38, was proceeding up the river. The Blackstone ran into the bow of L. T. C. No. 38 and capsized. Ten of the eleven persons aboard the Blackstone were rescued by the Eastern Cities, but appellee's decedent was drowned. Appellee began an action in the New York Supreme Court, Ulster County, against petitioner to recover $500,000 damages for the loss of her husband's life, alleging negligence on petitioner's part in respect of its operation of both the tug and the barge. Four other actions by survivors were begun in the State Court, alleging damages aggregating $157,000. On October 6, 1954, petitioner filed, in the court below, a petition for its exoneration from or limitation of liability. The petition alleged that the collision occurred without fault on the part of any of petitioner's servants and that petitioner was entitled to exoneration; it also alleged that the collision occurred without petitioner's privity or knowledge and that, if liable, petitioner was entitled to limit its liability to the value of its interest in both vessels. However, bond was given for $118,542.21, representing only the value of petitioner's interest in tug Eastern Cities and her pending freight. On October 8, 1954, the usual restraining order was issued, enjoining the beginning or prosecution of claims against petitioner except in the limitation proceeding; that order was not limited to the tug.

Appellee appeared specially and moved to dismiss the petition and to vacate the restraining order, on the ground that the bond failed to include the value of petitioner's interest in barge L. T. C. No. 38. This motion was denied by Judge Ryan, who continued the restraining order in force, conditioned, however, upon petitioner's filing an additional bond for the value of its interest in the barge, failing which the restraint would be modified so as to continue in effect only as to suits against petitioner as owner of the tug. Petitioner then filed an additional bond for the barge in the sum of $165,000. Appellee thereupon filed in the limitation proceeding, her claim for $250,000. Other

claims, aggregating $9,525 were filed on behalf of the ten rescued survivors.

Appellee then moved before Judge Weinfeld to vacate the restraining order as to her state court suit, on the theory that, since the total security on behalf of the tug and barge amounted to $283,542.21 and the claims totalled $259,525, upon the filing of appropriate stipulations in accordance with this Court's decision in *Petition of Texas Co.*, 213 F. 2nd 479, the restraint should be lifted. Judge Weinfeld denied that motion (in an opinion reported in 132 F. Supp. 504) without prejudice to a further application by appellee in the event appropriate stipulations were filed bringing all claims against petitioner as to each vessel within the amount of the bond as to such vessel. On September 23, 1955 the ten claimants, other than appellee, filed the usual stipulations agreeing not to increase the amounts of their claims as made, nor to enter judgments in excess of the stipulated amounts and waiving any claim of *res judicata* relative to the issue of limited liability with respect to either of the vessels. On the same day appellee filed a stipulation reducing her claim against petitioner as to the tug Eastern Cities to $100,000 and as to the barge to $150,000. She also agreed not to increase the amount of either of said claims as to either of the vessels, or to enter judgment in excess of the stipulated amounts of her claims against petitioner as owner of either of them, and she waived any claim of *res judicata* relative to the issue of limited liability in respect of either of the vessels.

Appellee again moved for modification of the restraining order. Judge Weinfeld wrote an opinion granting the motion, and, on January 17, 1956 entered an order to that effect. His order was explicitly based on appellee's stipulation (including partial releases, to which she had sworn before a notary public). In the stipulation and partial releases, she agreed to reduce her claim against petitioner (1) as to the tug to $100,000 and (2) as to the barge to $150,000. The other ten claims totalled $9,525.

In his opinion, Judge Weinfeld said in part: "In addition to the moving claimant there are ten others and the eleven claims constitute all possible claims which could be filed in this proceeding as a result of the disaster and the time to file has expired. The bond filed on behalf of the tug Eastern Cities is in the sum of $118,542.21, while the claims asserted against her under the stipulations filed by the claimants are limited to $109,525; the bond filed on behalf of the barge L. T. C. No. 38 is in the sum of $165,000, while the claims asserted against her under the stipulations filed by claimants are limited to $159,525. * * * There are now two separate funds, one for the tug and one for the barge. Each limitation fund is clearly in excess of the total sum of the claims asserted as against each vessel. A special verdict may be applied for which would spell out the precise liability that may be imposed with respect to each vessel. It is not to be presumed that the state court will deny an appropriate application for a special verdict. Thus in the event, under a special verdict, there is a finding of negligence in the operation of the tug and not of the barge, the moving claimant's recovery, under her stipulation, could not exceed the amount of her reduced claim. Accordingly, the total of her judgment and the remaining claims would be limited to the bond posted for the tug, which would preclude resort to the bond posted for the barge. And alternatively if liability were established solely because of the negligent operation of the barge, no recourse could be had as against the bond posted for the tug. Of course if liability should be found with respect to both the tug and barge, a different situation would prevail. Since petitioner as shipowner is fully protected in the limitation of liability as to each vessel, there is no sound reason why claimant should not be permitted to proceed with her action in the state court—the forum of her choice."

In the Appendix to this court's opinion are set forth pertinent parts of Judge Weinfeld's order and of appellee's stipulation (including her partial releases). From Judge Weinfeld's order, petitioner has appealed.

FRANK, *Circuit Judge*:

In *Petition of Texas Co.*, 213 F. 2nd 479, 482 (C. A. 2), we stated, as follows, the principles applicable here, in accordance with our previous decisions: "Absent an insufficient fund, (1) the statutory privilege of limiting liability is not in the nature of a *forum non conveniens* doctrine, and (2) the statute gives a ship-owner, sued in several suits (even if in divers places) by divers persons, no advantage over other kinds of defendants in the same position. Concourse is to be granted 'only when * * * necessary in order to distribute an inadequate fund.'[1] The purpose of limitation proceedings is not to prevent a multiplicity of suits, but in equitable fashion, to provide a marshalling of assets—the distribution pro rata of an inadequate fund among claimants, none of whom can be paid in full."[2] We quoted the provisions of 46 U. S. C. A. Section 184 that, when loss is suffered by several persons, "and the whole vessel, and her freight for the voyage, *is not sufficient to make compensation to each of them,* they shall receive compensation * * * *in proportion to their respective losses,*" and that the limitation proceedings are "for the *purpose of apportioning the sum* * * * among the parties entitled thereto." Subsequently, we said the same in *Matter of Trinidad Corp.*, — F. 2nd — (C. A. 2, December 28, 1955) and in *George J. Waldie Towing Co.* v. *Ricca,* 227 F. 2nd 900, 901 (C. A. 2).

Section 184 covers the liability of "the owner" of "the vessel." In the case at bar, it happens that petitioner owns two vessels, and may be liable for the conduct of either vessel or both. Had each vessel been owned by a separate

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[1] Here we cited *Curtis Bay Towing Co.* v. *Tug Kevin Moran, Inc.*, 159 F. 2nd 273, 276 (C. A. 2).

[2] Here we cited *Petition of Moran Transportation Corp.*, 185 F. 2nd 386, 388-389 (C. A. 2); *Petition of Red Star Barge Line, Inc.*, 160 F. 2nd 436 (C. A. 2); *The Aquitania*, 14 F. 2nd 456, 458, affirmed 20 F. 2nd 457 (C. A. 2).

owner, each owner could have instituted a limitation proceeding. So the owner here could have instituted one such proceeding to limit its liability as tug-owner to the value of the tug, and another proceeding as barge-owner to limit its liability to the value of the barge. The owner cannot enlarge its rights under the statute by the mere expedient of coupling the two proceedings.

Accordingly, we must regard this case just as if it comprised two separate limitation proceedings. On that basis, we affirm. For, in respect of petitioner's liability as owner of each vessel, the order and appellee's stipulation (including her partial releases) comply with what we required in the *Trinidad* case. We interpret the order, the stipulation, and the partial releases, to relate to the liability of petitioner *in personam* as the owner of each vessel separately. All the claims against petitioner as the tug's owner come to $109,525, an amount less than the bond of $118,542.21 as to petitioner's liability as owner of that vessel; all the claims against petitioner as the barge's owner come to $159,525, an amount less than the bond of $165,000 as petitioner as owner of that vessel. Consequently, there was not an insufficient fund in respect of petitioner's liability either as owner of the tug or as owner of the barge.

As Judge Weinfeld said, a special verdict in the state court suit will decide whether petitioner is liable for the conduct of either or neither vessel, or both vessels. That suit will not interfere with the exclusive admiralty jurisdiction of the court below affecting the limitation of liability: (a) No judgment of the state court can operate *in rem*. (b) Appellee's stipulation (which includes a waiver of any claim of *res judicata* relevant to the issue of limited liability of petitioner as owner of either the tug or the barge) and her partial releases, together with the reserved jurisdiction of the district court, prevent any effective determination by the state court of the value of either vessel.

We think, however, Judge Weinfeld's order should be amended to include the following: "If claimant obtains a

judgment in her state court suit for an amount in excess of $100,000, an injunction will issue permanently enjoining her from collecting such excess unless the judgment rests on a special verdict allocating the amount as between the libelant as owner of the tug and as owner of the barge respectively. Thus if the judgment exceeds $100,000 and the jury finds libelant liable solely as owner of the tug, she will be enjoined from collecting any excess. If the jury finds that the libelant is liable solely as owner of the barge, she will be enjoined from collecting any amount in excess of $150,000."

The other claimants are apparently content to proceed for a determination of their claims in the limitation proceeding.[3] It is possible that the court below, in passing on their claims, may adjudge the petitioner not liable, while the state court in appellee's suit may adjudge otherwise. But such an eventuality will present no difficulty. For the adjudication in the limitation proceeding concerning liability or non-liability to the other claimants will not serve as *res judicata* or estoppel by verdict for or against appellee in her state court suit, nor will the adjudication concerning liability or non-liability in appellee's state court suit have such an effect for or against the other claimants in the limitation proceeding.

Modified and affirmed as modified.

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[3] Petitioner suggests that perhaps the other claimants may seek to proceed elsewhere. The resultant problem cannot arise unless and until they file appropriate stipulations and partial releases. Moreover, an application to relax the restraining order as to them must be made seasonably, as we said in *Trinidad*; and the limitation proceeding was instituted a year and four months ago.

APPENDIX

Judge Weinfeld's order of January 17, 1956 reads, in part, as follows:

"Ordered that the motion of Lillian M. Henn * * * for an order vacating the restraining order entered herein on October 8th, 1954 with respect to her suit pending in the Supreme Court, State of New York, Ulster County, be and the same hereby is in all respects granted subject, however, to the following conditions:

1. that claimant shall be permitted to prosecute her suit in Supreme Court, State of New York, Ulster County only to judgment;

2. that the injunction of October 8th, 1954, insofar as it enjoins collection of the judgment elsewhere than in this proceeding, shall be continued;

3. that the Court expressly reserves jurisdiction to reestablish a concourse and to adjudicate the petitioner's right to a limitation in the event that the funds should ultimately prove to be inadequate;

4. that in no event shall this claimant recover from the fund an amount in excess of her claim as reduced by the partial releases heretofore given until all other claims have been satisfied in full;

5. that the Court further retains jurisdiction of this proceeding against the event that petitioner's right to limit liability of either the tug Eastern Cities or barge L. T. C. No. 38 should be questioned in any other forum."

Appellee's stipulation and partial releases read, in part, as follows:

"1. She reiterates and affirms the terms of the written stipulation, heretofore executed by her on September 6th, 1955, duly acknowledged before a Notary Public of the

State of New York, Dutchess County, and filed herein on September 23rd, 1955, providing:

(a) that her claim as against the tug Eastern Cities, the ad interim stipulation for value filed on its behalf, the petitioner and its stipulators for value is reduced to the sum of $100,000;

(b) that her claim as against the barge L. T. C. No. 38, the ad interim stipulation for value filed on its behalf, the petitioner and its stipulators for value is reduced to the sum of $150,000;

(c) that she will not increase the amount of either of said claims as against either of the said vessels, as above stated, or the petitioner and its stipulators for value at any future date beyond the amounts so stated;

(d) that she will not enter judgment in any Court in excess of the stipulated amounts of her claims against petitioner as owner of either of said vessels;

(e) that she hereby waives any claim of res judicata relevant to the issue of limited liability with respect to either of said vessels, based on a judgment in any other Court.

2. As her unconditional partial release she represents:

(a) that the total amount of all claims filed herein as against the tug Eastern Cities and the petitioner, as her owner, is $109,525; the total amount of all claims filed herein as against the barge L. T. C. No. 38 and the petitioner, as her owner, is $159,525;

(b) that in consideration of the entry of an order upon this stipulation, pursuant to the decisions of Honorable Edward Weinfeld, United States District Judge, dated December 29th and 30th, 1955, modifying the injunctive order entered herein October 8th,

1954, to permit the prosecution of her suit in Supreme Court, State of New York, Ulster County, she hereby releases and forever discharges the petitioner, its successors and assigns and the tug Eastern Cities and the barge L. T. C. No. 38 unconditionally but partially to the extent hereinafter described from all causes of action whatsoever, in law, in admiralty or in equity which against them she ever had, now has or which her successors hereafter shall or may have by reason of the death of Robert C. Henn on July 10th, 1954, resulting from a collision between the motor yacht Blackstone, on which he was a passenger, with the barge L. T. C. No. 38 in tow of the tug Eastern Cities, in the Hudson River; it being the intent and purpose of this release that it be partial to the extent of the difference between the amount of her claim originally filed herein in the sum of $250,000 and the reduced amount of her claim heretofore, stipulated as against the tug Eastern Cities of $100,000, so that the amount hereby released as to such tug and the petitioner is $150,000; and it being the further intent and purpose of this release that it be partial to the extent of the difference between the amount of her claim originally filed herein in the sum of $250,000 and the reduced amount of her claim heretofore stipulated as against the barge L. T. C. No. 38 of $150,000, so that the amount hereby released as to such barge and the petitioner is $100,000.

3. She consents to, and hereby authorizes her proctors, Rosen & Rosen, to submit an order to the Court for entry and providing:

(a) that she shall be permitted to prosecute her suit in Supreme Court, State of New York, Ulster County only to judgment:

(b) that the injunction of October 8th, 1954, insofar as it enjoins collection of the judgment elsewhere than in this proceeding, shall be continued;

(c) that the Court expressly reserves jurisdiction to reestablish a concourse and to adjudicate the petitioner's right to a limitation in the event that the funds should ultimately prove to be inadequate;

(d) that in no event shall this claimant recover from the fund an amount in excess of her claim as reduced by the partial releases heretofore given until all other claims have been satisfied in full;

(e) that the Court further retains jurisdiction of this proceeding against the event that petitioner's right to limit liability of either the tug Eastern Cities or barge L. T. C. No. 38 should be questioned in any other forum.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, as the Administratrix of the Estate of Robert C. Henn, deceased, the 7th day of January in the year One Thousand Nine Hundred and Fifty-six.

LILLIAN M. HENN L. S.
Administratrix of the Estate of
Robert C. Henn, deceased

(Verified on January 7, 1956, by Lillian M. Henn, as claimant.)"

HINCKS, *Circuit Judge* (dissenting):

My brothers say: "We must regard this case just as if it comprised two separate limitation proceedings. On that basis, we affirm." Even if I agreed that this treatment of the situation is correct, I should still be constrained to dissent. For on that basis, in the tug proceeding the

claimant's claim is for damages caused by the tug in the amount as reduced by stipulation, of $100,000, and the owner's liability depends on the fault of the tug; in the barge proceeding the claim is for damages caused by the barge in the reduced amount of $150,000, and the owner's liability depends on the fault of the barge.

Such being the situation, suppose the state court on a general verdict enters judgment in favor of the claimant in excess of $100,000. What possible effect can such a judgment have? It appears to me that it would be wholly uncollectible in either limitation proceeding. Under the amendment of the order below required by the court's opinion, the claimant will be enjoined "from collecting such excess." Under an original provision of the order, the claimant is enjoined from all collection "of the judgment elsewhere than in this [the limitation] proceeding." The general judgment will not be *res judicata* on the issue of liability in the tug proceedings; it does not import a finding of fault by the tug. Likewise, in the barge proceedings; it does not import a finding of fault in the barge. Thus, notwithstanding the judgment, the issue of liability will be open in both proceedings.

Or suppose that in the state court the claimant obtains a judgment on a general verdict in an amount say of $5000 and being disappointed in the amount thereof decides to press her claims in the limitation proceedings. On no theory of *res judicata* or collateral estoppel can the owner use the state court judgment as decisive on the issues. It will not bar prosecution of the claim in the tug proceedings, because it did not adjudicate that the tug was not at fault. And so in the barge proceedings. The limitation court, perhaps after all the other claims have been heard and adjudicated, will have to hold a full-fledged trial for its determination of the claimant's claim, with a result which may or may not be more satisfactory to the claimant.

Thus considered, the disposition of the court, in my view, subjects the parties to the labor and expense of litigation which well may prove to be wholly fruitless and nugatory.

That such may prove to be the result, I think more than a remote possibility. For that result will follow unless in the state court trial the judge shall require the jury to find specially whether the plaintiff's injury (if caused by the owner's negligence) was caused by negligence in its conduct of the tug or by negligence in the barge. Without special findings, it would be necessary for the jury to determine only whether a proved act of negligence caused the plaintiff's injury. The requirement of special findings will require the jury to determine also whether a proved act of negligence was part of the conduct of a particular vessel,—a determination which under the evidence may involve confusion and difficulty. The plaintiff might prove an act of negligence and yet fail to prove that the act was a part of the owner's conduct of a particular vessel. In my opinion, it is by no means unlikely that the judge would refuse a request to require special findings on the ground that the request if granted would inject into the case an additional issue the solution of which is not essential to the decision of the case under the law of the state. It may also be observed that if a special verdict were required and claims of error should be predicated on the disposition of that additional issue, the parties would be without the usual remedy by motion or appeal. For it is hardly to be supposed that the trial court or an appellate court would give relief for an error pertaining to an issue which under the law of the state did not affect the validity of the judgment.

My brothers cite our former decisions in *Texas, Trinidad* and other cases for the proposition that a claimant's choice of forum should be protected and that the Limitation Act does not entitle an owner to a determination in the limitation proceedings of its liability to a multiplicity of claimants growing out of a multiple tort except in cases in

which by reason of an inadequate fund a concursus is required. But these cases went no further than to permit litigation at law which would be dispositive,—not litigation which may prove to be nugatory. I think it an unwarranted and undesirable extension of the *Texas* doctrine to sanction procedure whereby two trials, one at law and the other in the limitation proceedings, may be required for a final determination of the issues of a single claim.

I would hold that we have here one proceeding for the limitation of the owner's personal, indivisible, liability to the appellee, among other claimants, on her single indivisible claim. I deprecate sanction for a procedure whereby indivisible causes of actions and indivisible liabilities may be split and their respective fragments may be litigated in separate proceedings. If, as I think, this is a single limitation proceeding, even though two vessels are involved, the claims concededly exceed the fund which may be fixed, and the *Texas* doctrine is inapplicable.

(Memorandum Inviting Additional Briefs for Rehearing)

UNTED STATES COURT OF APPEALS

SECOND CIRCUIT

In the Matter

of

PETITION OF LAKE TANKERS CORP.,

LILLIAN M. HENN, etc.,

Claimant-Appellee.

Before:

CLARK, *Chief Judge*, FRANK and HINCKS, *Circuit Judges*.

The petition will be considered by all of the six judges upon the briefs, appendices, and memoranda of the parties. The court suggests that counsel may find it appropriate to file new briefs restating in succinct form the points they wish to make, with a recitation of what has happened in the case, so that the additional judges now to consider the matter may be able to understand the questions at issue without the necessity of re-examining too many separate documents. Since counsel have exchanged briefs extensively to date, it would seem appropriate that if they now file such new briefs they do so simultaneously within a reasonable time, to be arranged after conference with the Clerk.

(Opinion of United States Court of Appeals, For the Second Circuit, on Petition for Rehearing en banc)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 268—October Term, 1955.

(Petition filed June 7, 1956 Decided August 21, 1956.)

Docket No. 23965

Matter of the Petition of LAKE TANKERS CORPORATION for Exoneration from or Limitation of Liability.

Before:

CLARK, *Chief Judge*, and
FRANK, MEDINA, HINCKS, LUMBARD, and WATERMAN, *Circuit Judges*.

On Petition for Rehearing *en banc*.

BURLINGHAM, HUPPER & KENNEDY, New York City (Eugene Underwood and H. Barton Williams, New York City, of counsel), *for Lake Tankers Corporation, petitioner-appellant.*

ROSEN & ROSEN, Poughkeepsie, N. Y., and MAHAR & MASON, New York City (Frank C. Mason, New York City, of counsel), *for Lillian M. Henn, claimant-appellee, in opposition.*

PER CURIAM:

Petition for rehearing *en banc* of our decision, 2 Cir., 232 F. 2d 573, affirming as modified the decision, D. C. S. D. N. Y., 137 F. Supp. 311, granted. Upon due and further consideration by the entire court of the appeal on the merits and of the able additional briefs submitted by counsel for the respective parties, we adhere to our original decision, Judges Clark, Frank, Lumbard, and Waterman, concurring, Judges Medina and Hincks dissenting.

(Limitation Statute. Title 46 U. S. Code §§183(a), 184, 185)

"§ 183(a). The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property * * *, or for any loss, damage, or injury by collision * * * done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

"§ 184. Whenever any such embezzzlement, loss, or destruction is suffered * * * and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose * * * the owner of the vessel * * * may take the appropriate proceedings in any court, for the purpose of apportioning the same for which the owner of the vessel may be liable among the parties entitled thereto.

"§ 185. The vessel owner * * * may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the Court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the Court may from time to time fix as necessary to carry out the provisions of § 183 of this title * * *. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease."

(United States Supreme Court Rules 51, 52, 53, 54)

"RULE 51. The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability * * * may file a petition in the proper district court * * *. With his petition the petitioner may, if he so elects, file an interim stipulation, with sufficient sureties or an approved corporate surety, for the payment into Court whenever the Court shall so order, of the aggregate amount of the value of petitioner's interest in the vessel * * *.

"Upon the filing of such interim stipulation * * * the Court shall issue a monition * * *.

"The said Court shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect of any claim or claims subject to limitation in the proceeding.

"RULE 52. * * * Proof of all claims which shall be filed in pursuance of said monition shall thereafter be made before a commissioner * * * and on confirmation of said commissioner's report * * * the moneys paid or secured to be paid into Court as aforesaid * * * shall upon determination of liability be divided pro rata * * * amongst the several claimants in proportion to the amount of their respective claims * * *.

"RULE 53. In the proceedings aforesaid, the petitioner shall be at liberty to contest his liability, or the liability of said vessel, * * *.

"RULE 54. The said petition shall be filed and the said proceedings had in any district court of the United States in which said vessel has been libeled * * * or, if the said vessel has not been libeled, then in the district court for any district in which the owner has been sued * * *."

BRIEF FOR PETITIONER

Supreme Court of the United States

October Term, 1956

No. 445

LAKE TANKERS CORPORATION,

Petitioner,

against

LILLIAN M. HENN, Admx.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Supreme Court of the United States

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BRIEF FOR PETITIONER

Opinions Below

The first opinion in the District Court, that of RYAN, J., is reported only at 1955 A. M. C. 55. It is at page 21 of the record. The first and second opinions of WEINFELD, J., are reported at 132 F. Supp. 504 and 137 F. Supp. 311.

The first opinion of the Court of Appeals is reported at 232 F. 2d 573 and is at page 57 of the record. Its memorandum inviting additional briefs for the rehearing *in banc* is not reported; it is at page 81 of the record. Its *per curiam* opinion granting the petition for rehearing *in banc* but adhering to its original decision is reported at 235 F. 2d 783 and is at page 82 of the record.

Jurisdiction

The judgment of the Court of Appeals was entered on April 13, 1956 (R. 69). The petition for rehearing *in banc* was granted and the original decision adhered to on August 21, 1956 (R. 82). The petition for certiorari was filed on September 24, 1956 and was granted November 19, 1956. The jurisdiction of this Court rests on 28 U. S. C. § 1245(1).

Question Presented

Is the owner of a tug and barge entitled to maintain a proceeding for limitation of liability and to obtain a *concursus* and one decision, binding upon all parties as to the issues of liability, amount of the limitation fund and the amounts to be recovered by the several claimants, when it is confronted with eleven death, personal injury and loss of property claims, the aggregate of which is greater than the amount of its limitation fund as may be determined after trial?

Statute and Rule Involved

The pertinent portions of the limitation statute,* Title 46 U. S. Code, §§ 183 *et seq.*, are as follows:

> "§ 183(a). The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property * * *, or for any loss, damage, or injury by collision * * * done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

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* The entire statute is printed in the appendix hereto.

Sub-section (b) and the ensuing sub-sections of § 183 provide for the statutory fund of $60 per ton but are limited to "seagoing" vessels and are not applicable here.

> "§ 184. Whenever any such embezzlement, loss, or destruction is suffered * * * and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose * * * the owner of the vessel * * * may take the appropriate proceedings in any court, for the purpose of apportioning the same for which the owner of the vessel may be liable among the parties entitled thereto.
>
> "§ 185. The vessel owner * * * may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the Court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the Court may from time to time fix as necessary to carry out the provisions of § 183 of this title * * *. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease."

The pertinent sections of the Supreme Court Admiralty Rules,* Title 28, U. S. Code, Rules, are as follows:

> "RULE 51. The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability * * * may file a petition in the proper district court * * *. With his petition the petitioner may, if he so elects, file an interim stipulation, with sufficient sureties or an approved corporate surety, for the

* Rules 51-55 are printed in their entirety in the appendix hereto.

payment into Court whenever the Court shall so order, of the aggregate amount of the value of petitioner's interest in the vessel * * *.

"Upon the filing of such interim stipulation * * * the Court shall issue a monition * * *.

"The said Court shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect of any claim or claims subject to limitation in the proceeding.

"RULE 52. * * * Proof of all claims which shall be filed in pursuance of said monition shall thereafter be made before a commissioner * * * and on confirmation of said commissioner's report * * * the moneys paid or secured to be paid into Court as aforesaid * * * shall upon determination of liability be divided pro rata * * * amongst the several claimants in proportion to the amount of their respective claims * * *.

"RULE 53. In the proceedings aforesaid, the petitioner shall be at liberty to contest his liability, or the liability of said vessel, * * *.

"RULE 54. The said petition shall be filed and the said proceedings had in any district court of the United States in which said vessel has been libeled * * * or, if the said vessel has not been libeled, then in the district court for any district in which the owner has been sued * * *."

Statement of Case

Shortly before 1:00 A. M., July 10, 1954, the yacht BLACKSTONE was proceeding south in the Hudson River with eleven men on board, returning to Poughkeepsie from a moonlight excursion to Kingston. Petitioner's tug EASTERN CITIES, push-towing petitioner's barge LTC No. 38, was proceeding up the Hudson River. The BLACKSTONE

ran into the bow of No. 38, capsized and sank. Ten of the eleven persons aboard were rescued by the EASTERN CITIES, but respondent's decedent has not reappeared.

Respondent began an action in the New York Supreme Court, Ulster County, to recover $500,000 damages for the loss of her husband's life. Additional actions at law were brought against petitioner by Clyde W. Roan, owner of the BLACKSTONE, claiming $7,500 for property damage and $25,000 damages for personal injury, by Robert E. Cruz, claiming $25,000 damages for personal injuries, and by John E. Strong and Charles A. Carlson, each of whom claimed $50,000 damages for personal injuries.

The aggregate of these five suits was $657,500 and six of the persons aboard the BLACKSTONE remained to be heard from. The value of the EASTERN CITIES was about $110,000 and the value of No. 38 about $165,000. The pending freight was $8,542.21. Thus petitioner was faced with suits claiming $374,000 more than the value of its interest in the vessels, with six additional suits still to be expected. Accordingly petitioner filed, in the United States District Court for the Southern District of New York, its petition for exoneration from or limitation of liability and claimed the benefit of the Limitation of Liability Statutes, Title 46, U. S. Code, §§ 183(a), 184 and 185. The petition (R. 1) contained the allegations required by Supreme Court Admiralty Rule 51 and, pursuant to that rule, petitioner filed an *interim* stipulation for the payment into court, whenever the court might order, of the value of its interest in the vessel (R. 7). The amount of this *interim* stipulation was $118,542.21, being the value of the EASTERN CITIES plus the pending freight. No. 38 was without power and was wholly controlled by the tug; therefore, it was thought that the EASTERN CITIES was the "vessel" and that a stipulation for her value was enough. *Liverpool, etc. Nav. Co.* v.

Brooklyn Eastern District Terminal, 251 U. S. 48, 53; *The Transfer No. 21*, 248 Fed. 459, 461 (2 Cir.). However, petitioner, in its petition, avowed its readiness and willingness to give a stipulation for the payment into court of the value of "such additional interest as may be appropriate whenever the same shall be ordered" (R. 4).

The *interim* stipulation for the value of the EASTERN CITIES was approved by the Court and the Court, pursuant to the third paragraph of Supreme Court Admiralty Rule 51, thereupon issued its monition against all persons asserting claims in respect of which the petitioner sought limitation, citing them to file their claims in the limitation proceeding. Pursuant to the final paragraph of Supreme Court Admiralty Rule 51, the District Court also issued its order restraining all persons from prosecuting claims arising out of the collision elsewhere than in the limitation proceeding (R. 10).

Respondent then appeared specially and moved to dismiss the petition on the asserted ground that the *interim* stipulation was inadequate because it did not include the value of No. 38. The District Court, Ryan, J., granted the motion because there was a separate claim of negligence on the part of No. 38 and required petitioner to give an additional stipulation for her value. Petitioner promptly filed an additional *interim* stipulation for $165,000 and petitioner raises no question here as to the propriety of that requirement.

Thereafter, respondent filed her claim in the limitation proceeding for $250,000, one-half the amount sued for in the State Court action, although that action remained, and still remains, pending without reduction in the *ad damnum*. Each of the ten survivors filed separate claims for personal injuries and for property damage, the aggregate of these being, as filed in the limitation proceeding, $9,525. The

total of all claims filed in the limitation proceeding was, therefore, $259,525. This total exceeded the value of the EASTERN CITIES and exceeded the value of No. 38, but was less than the aggregate value of both.

In this posture, respondent moved to vacate the restraining order so that she might proceed with her action at law, asserting that the claims aggregated less than petitioner's limitation fund. She relied upon *Petition of Texas Company*, 213 F. 2d 479 (2 Cir.); *certiorari denied* 348 U. S. 829. Her argument was that the limitation fund was $283,542.21, the sum of the two *interim* stipulations and, because the claims were only $259,525, petitioner needed no *concursus* because the fund was adequate to pay all in full. However, respondent confused the amount of the eventual limitation fund with the sum of the *interim* stipulations, which were no more than security for the eventual fund and WEINFELD, J. denied the motion, holding that the amount of the fund could not be determined until after trial because the fund will consist of the value only of the vessel(s) at fault *in rem*. This is settled law. *Liverpool, etc. Nav. Co.* v. *Brooklyn Eastern District Terminal*, 251 U. S. 48; *The Transfer No. 21*, 248 Fed. 459 (C. A. 2); *Standard Dredging Co.* v. *Kristiansen*, 67 F. 2d 548 (C. A. 2), *certiorari denied* 290 U. S. 704; *Harbor Towing Corp.* v. *Atlantic Mutual Insurance Co.*, 189 F. 2d 409 (C. A. 4). The Judge therefore held that the premise underlying respondent's motion was false and denied the motion. *Petition of Lake Tankers Corporation*, 132 F. Supp. 504 (R. 42). However, in his opinion the Judge suggested that respondent could escape the restraining order and the *concursus* of the limitation proceeding if she would apportion her claim against tug and barge and bring the amounts of the claims against each vessel to a sum less than its value. Respondent followed this suggestion and filed a stipulation stating her claim against tug and barge in separate amounts, but her claim against petitioner re-

mained the same, viz. $250,000. The claims were then, and still are, as follows:

Respondent.	*In this proceeding*	*In pending actions at law*
allocated to tug	$100,000	
allocated to barge	150,000	
against petitioner	250,000	$500,000
Not allocated as between tug and barge:		
Roan	4,400	32,500
Carlson	3,000	50,000
Cruz	225	25,000
Strong	1,600	50,000
Van Wart	50	
Hughes	50	
McNutt	50	
Raymond	50	
Cady	50	
Ratledge	50	
Total	$259,525	$657,500

Thus the aggregate of claims against petitioner in this proceeding remained $259,525. The eventual limitation fund, as distinguished from the *interim* security, will exceed the claims only if both vessels are held at fault. If only one is held at fault the fund will not be adequate and a concourse will be necessary to distribute it pro rata. Whether either vessel was at fault, or whether both were, cannot be determined until after trial.

Whether or not the fund proves to be adequate, the eleven claims against petitioner arise out of the same occurrence and turn upon the same facts and law. A concourse will permit their decision in one proceeding the result of which will be binding upon them vis-a-vis peti-

tioner, and also among themselves. The latter is an essential consideration if the fund should be inadequate.

Nevertheless, after apportioning her claim, respondent again moved to vacate the restraining order, this time on the ground that the claims against each vessel were less than its value. Weinfeld, J., granted this motion, holding that there are two funds, each more than the claims against it. *Petition of Lake Tankers Corporation*, 137 F. Supp. 311.

On appeal a divided Court affirmed, holding that concourse will be granted only when necessary to distribute an inadequate fund, that this single proceeding, by a single petitioner, must be regarded as if it were two separate proceedings because two vessels are involved, and that, since the claims allocated to each vessel are less than its value, respondent can not be held in the concourse of the limitation proceeding (R. 57).

In a strong dissent, Hincks, C. J., held that this single proceeding, by a single petitioner, cannot be regarded as if it were two; that since the claims against petitioner exceed the possible fund the Admiralty Court must keep them all in limitation proceeding and that the prosecution of respondent's action at law will be "wholly fruitless and nugatory" (R. 66).

Petitioner filed a petition for a re-hearing *in banc*. After four months the Court filed its *per curiam* opinion granting the petition for re-hearing *in banc* but adhering to its original decision. No reasons for the decision were stated. Judges Clark, Frank, Lumbard and Waterman concurred; Judges Medina and Hincks dissented (R. 82).

Summary of Argument

The limitation proceeding was properly brought. The Admiralty Court acquired full jurisdiction, and the prosecution of claims in the State Court actions was properly enjoined, because the aggregate of the several claims exceeded the value of petitioner's interest in its vessels. The Court's jurisdiction, properly acquired and taken, is not subject to defeasance at the whim of claimants' counsel by reducing or purporting to allocate the claims. Despite these maneuverings the claims still exceed the possible amount of the fund and petitioner is entitled to a *concursus* for their disposition.

ARGUMENT

I. Upon the filing of the petition the District Court acquired jurisdiction of the proceeding.

In *Norwich Company* v. *Wright*, 13 Wall. 104, this Court recognized the need for rules to guide the shipowner in seeking the protection of the Limitation Statutes, which contain no procedural provisions, and coincident with that decision promulgated the Rules (*supra*, pp. 3-4; *infra* pp. 44-50).

Rule 51 of the Supreme Court Admiralty Rules does not condition the Court's jurisdiction of a limitation petition upon an allegation that the claims exceed the value of the petitioner's interest in the vessel. Rule 51 specifies what allegations must be made and requires that "the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort, arising on that voyage" be stated. It also provides for an ex-parte *interim* appraisal of the value of the petitioner's interest in the vessel, etc., or alternatively for the transfer of the petitioner's interest

to a trustee. In its third paragraph Rule 51 provides that upon the filing of an *interim* stipulation or a surrender to a trustee "the court shall issue a monition. . . . . " and in its last paragraph Rule 51 provides that upon the application of the petitioner the Court shall restrain the further prosecution of all claims except in the limitation proceeding. The rule contains no requirement that the claims exceed the fund in fact or that the petitioner so allege.

The same is true of the statute. Title 46 U. S. Code, Section 185, as amended in 1936, provides that the shipowner may file his petition within 6 months after a claimant shall have given written notice of claim. It does not require that the amount claimed exceed the value of the petitioner's interest in the vessel. Section 185 further provides that the petitioner, having filed his petition and given the required security, may have an order directing that "all claims and proceedings against the owner with respect to the matter in question shall cease".

It cannot be denied that neither the statute nor the rules require that the claims exceed the fund, or that petitioner so allege, before the Court can take jurisdiction.

In this case, however, actions had been begun against petitioner claiming an aggregate of $657,500 before the petition was filed and the value of the petitioner's interest in the two vessels was not more than $283,500. If there were a requirement that the claims exceed the value of the vessel(s) it was obviously met.

II. Jurisdiction once obtained is not lost by reducing the claims to an amount less than the fund.

In *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, this Court, over 70 years ago, held that juris-

diction once obtained should be kept to a final determination of the whole dispute. The Court said:

> "* * * after proceedings have been commenced in the proper District Court in pursuance thereof, the prosecution pari passu of distinct suits in different courts, or even in the same court by separate claimants, against the shipowners, is, and must necessarily be, utterly repugnant to such proceedings and subversive of their object and purpose" (p. 594).
>
> "Proceedings, under the act having been duly instituted in this court, it acquired full jurisdiction of the subject-matter; and having taken such jurisdiction, and procured control of the vessel and freight (or their value), constituting the fund to be distributed, and issued its monition to all parties to appear and present their claims, it became the duty of all courts before which any of such claims were prosecuted, upon being properly certified of the proceedings, to suspend further action upon said claims" (p. 599).

In *In re Morrison*, 147 U. S. 14, this Court said:

> "The filing of the libel and petition of the steamship company, with the offer to give a stipulation, conferred jurisdiction upon the court, and no subsequent irregularity in procedure could take away such jurisdiction" (p. 34).

In *The San Pedro*, 223 U. S. 365, this Court recited that there had been due appraisment of the value of the owner's interest, that a proper stipulation for value had been given and that a monition had thereupon duly issued. This, the Court said, cemented the jurisdiction of the District Court:

> "In that situation, the jurisdiction of the court to hear and determine every claim in that proceeding became exclusive. It was then the duty of every

other court, Federal or state, to stop all further proceedings in separate suits upon claims to which the limited liability act applied" (p. 372).

In *Hartford Accident and Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, this Court said:

> "The jurisdiction of the admiralty court attaches in rem and in personam by reason of the custody of the res put by the petitioner into its hands. The court of admiralty, in working out its jurisdiction, acquires the right to marshal all claims, whether of strictly admiralty origin or not, and to give effect to them by the apportionment of the res and by judgment in personam against the owners, so far as the court may decree * * *" (pp. 217-8).

In *Anderson* v. *Alaska S.S. Co.*, 22 F. 2d 532 (9 Cir.), the Court said:

> "Nor is it material that the aggregate amount of the claims presented was less than the appraised value, because the right of limitation *depends on the probable amount of the claims against the vessel at the date of filing the petition*, not on the amount of the claims subsequently filed or allowed" (p. 534, italics ours).

The John K. Gilkinson, 150 Fed. 454, and 156 Fed. 868; *The Tolchester*, 42 Fed. 180; *The Garden City*, 26 Fed. 766, and *Briggs* v. *Day*, 21 Fed. 727, are to the same effect.

Analogy of the Diversity Cases.

The analogy between the present case and those arising under Section 1331 of Title 28, U. S. Code, is strong. The jurisdictional amount is $3,000. This Court has flatly held that the jurisdiction of the District Court attaches upon the allegation, in good faith, that more than $3,000 is involved

and may not be defeated by a subsequent reduction in the amount of the claim. In *St. Paul Mercury Indemnity Company* v. *Red Cab Company*, 303 U. S. 283, this Court said:

> "And though, as here, the plaintiff after removal, by stipulation, by affidavit, or by amendment of his pleadings, reduces the claim below the requisite amount, this does not deprive the District Court of jurisdiction.
>
> "Thus events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the District Court's jurisdiction once it has attached" (pp. 292-3).

The Court continued:

> "We think this well established rule is supported by ample reason. If the plaintiff could, no matter how *bona fide* his original claim in the state court, reduce the amount of his demand to defeat federal jurisdiction the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice. The claim, whether well or ill founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election" (p. 294).

Compare *McDonald* v. *Patton*, 240 F. 2d 424 (4 Cir.).

These precepts apply with full force here. Petitioner, confronted with five suits for sums that aggregated $374,000 more than the value of its two vessels, in good faith filed its petition seeking limitation of liability and a *concursus*. Respondent, who sued for $300,000 in the State Court, filed her claim in this proceeding for half that, $250,000, and

Roan, Carlson, Cruz and Strong, who had sued for an aggregate of $157,500 in their State Court actions, filed claims in this proceeding for only $8,225. The six others filed claims for only $50 each in this proceeding. This brought the aggregate to $259,525, just below the value of petitioner's two vessels and the pending freight, $283,500. Obviously these reductions were made by claimants acting in concert for the very purpose of questioning the Admiralty jurisdiction.

It is not for them to say that the amounts of their claims as originally filed were not stated in good faith. There is no reason why jurisdiction of a limitation proceeding should depend on the claimants' caprice.

III. *Concursus* is not contingent upon the existence of an inadequate fund.

The existence of several claims arising out of the same maritime accident or disaster is alone enough to give the Admiralty Court jurisdiction to bring all the parties into concourse and determine all the rights and liabilities in one proceeding. This Court has said many times that one of the purposes of the Act was to bring all the parties into concourse and that the proceeding is analogous to an equity proceeding to enjoin a multiplicity of suits.

In *Maryland Casualty Co. v. Cushing*, 347 U. S. 409, Mr. Justice Frankfurter assigned two reasons for concluding that the Louisiana statute permitting direct suits against liability underwriters could not apply to maritime policies. His *first* was that it encroached "upon the federal statutory system for bringing all claims into concourse" (p. 417). It was only as his *second* reason that he mentioned that the limited liability feature of the Act might

be frustrated if the Louisiana statute were sustained. This clearly points up the dual purpose of the Act as this Court has uniformly construed it: (1) to bring claims into concourse and, (2) to limit the shipowner's liability to the value of his interest in his vessel. At pages 414-17 Mr. Justice Frankfurter reviewed the 1936 amendments to the Act, quoted at length from the Congressional hearings and from earlier decisions as to its purpose and said:

> "The heart of this system is a *concursus* of all claims to ensure the prompt and economical disposition of controversies in which there are often a multitude of claimants" (p. 415).

In *Hartford Accident and Indemnity Co.* v. *Southern Pacific Co., supra*, 273 U. S. 207, Mr. Chief Justice Taft emphasized the importance of a *concursus* and said:

> "The proceeding partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader, and a creditors bill. It looks to a complete and just disposition of a many cornered controversy, * * *" (p. 216).

In *Butler* v. *Boston Steamship Co.*, 130 U. S. 527, Mr. Justice Bradley, who probably had more to do with the early delineation of the meaning of the Act than any other Justice of the Court, referred to

> "The beneficent object of the law in enabling the ship owner to bring all parties into concourse who have claims arising out of the disaster or loss, and thus to prevent a multiplicity of actions, * * *" (p. 552).

In *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co., supra*, 109 U. S. 578, Mr. Justice Bradley earlier wrote:

> "The inconveniences that may arise from preventing or arresting the prosecution of separate suits

> by the claimants are no greater in this case than in the case where proceedings at law are arrested for the purpose of having an investigation in a court of equity, or where distinct and separate suits are restrained for the purpose of settling a common controversy in a single proceeding, as in the case of bills for preventing a multiplicity of suits, and in cases of bankruptcy" (p. 596).

See also *The Scotland, supra*, 105 U. S. 24, 33; *Ex parte Slayton*, 105 U. S. 451, 452; and *Just* v. *Chambers, supra*, 312 U. S. 383, 385-6.

There are five situations in which the shipowner may invoke the Act without an "inadequate fund":

(1) where there is no liability;

(2) where there is liability without limitation;

(3) where there is liability with the right to limit but nothing of value remains of the vessel and there is no freight or passage money;

(4) where there is liability with the right to limit but the fund exceeds the proved claims, and

(5) where, as in this case, after the filing of the petition and the claims it is made to appear that the claims are less than the value of petitioner's interest in the vessel.

As shown below, in the first four situations it is established that the courts will take jurisdiction of the limitation proceeding although there is no need for a concourse to distribute an inadequate fund.

1. No Liability.

Supreme Court Admiralty Rule 53 expressly provides that the petitioner shall be at liberty to contest his liability—as appellant does here (R. 4). The shipowner's denial of liability does not divest the Court of jurisdiction.

In *Butler* v. *Boston S.S. Co., supra*, 130 U. S. 527, Mr. Justice Bradley wrote:

> "Allegations that the owners themselves were in fault cannot affect the jurisdiction of the court to entertain a cause of limited liability, *for that is one of the principal issues to be tried in such a cause*" (p. 552; italics ours).

Obviously if the petitioner may contest his liability it is possible that there may be no liability and therefore no occasion to distribute any fund, adequate or inadequate. Nevertheless petitioner can compel the claimants to come into concourse for a determination of the question of liability in a single proceeding.

In *Hartford Accident and Indemnity Co.* v. *Southern Pacific Co., supra*, 273 U. S. 207, this Court stated the order of proof at the trial of a limitation proceeding, viz.:

> "* * * it shall be determined, first, whether the owner and his vessel are liable at all; second, whether the owner may avoid all liability except that of the vessel and pending freight; third, what the amount of the just claims are, and, fourth, how the fund in court should be divided between claimants" (p. 215).

Inasmuch as there may be no liability, it is quite possible that the claimants may be turned away without the distribution of any fund. Yet they will have been compelled to come into concourse on the question of liability. Plainly, therefore, this is one situation where the existence of an inadequate fund is not essential to the Court's jurisdiction. There is no need to determine "what the amount of the just claims are" until after the question of liability has been decided.

2. No Limitation.

The District Court, having tried the case and held that the petitioner is liable without limitation, not only has the *power* but the *duty* to keep jurisdiction and settle the controversy in its entirety. *Hartford Accident Co.* v. *Southern Pacific Co., supra*, 273 U. S. 207; *Just* v. *Chambers*, 312 U. S. 383; *Spencer Kellogg Co.* v. *Hicks*, 285 U. S. 502.

This, therefore, is another situation which shows that an inadequate fund is not necessary to a *concursus*.

3. No Fund.

In *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co., supra*, 109 U. S. 578, this Court assumed a situation where the vessel was totally lost and there was no freight money *i.e.*, no fund at all, and considered whether a petition would lie on those facts. The argument was that no petition would lie because, there being no fund, the vessel owner had no need to bring the claimants into concourse to distribute it. This Court held that nevertheless a petition would lie.

To like effect, in *Petition of Wood*, 124 F. Supp. 540, the petition alleged that the vessel was a total loss and that there was no pending freight or any limitation fund. A motion was made to dismiss the petition, or in the alternative to allow the claimants to pursue their common law remedies, because there was no fund for distribution. Judge Goddard denied the motion, holding that the existence of an inadequate fund is not a prerequisite to the maintenance of a limitation proceeding.

4. Adequate Fund.

Where, after trial, petitioner is held liable and is granted the right of limitation but the proved claims are less than the fund, the petition is not dismissed; rather the claimants

are paid in full and the balance is repaid to the petitioner. *Briggs* v. *Day*, 21 Fed. 727.

The foregoing review of the possible situations abundantly establishes that limitation petitions may not properly be restricted to the situations where the fund is not sufficient. Jurisdiction has been taken and retained in four of the possible situations where there is not an inadequate fund. The same reasons exist for retaining jurisdiction in this case because of the eleven claims arising out of the one collision and sinking. The similarity of the limitation procedure to the Bills of Peace in equity to prevent multiplicity of actions in striking and has not been ignored. See Chafee, *Bills of Peace With Multiple Parties*, 45 Harv. L. Rev. 1297, 1312 (1932). *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 216; *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 596.

The liberal third party practice under the Supreme Court Admiralty Rule 56 also looks to the disposition of many claims in one action. *Munson Inland Lines Inc.* v. *Insurance Co. of North America*, 36 F. 2d 269 (S. D. N. Y. 1929); *British Transport Comm's* v. *United States*, 230 F. 2d 139 (4th Cir.) cert. granted 352 U. S. 821, No. 247; see *Note* 66, Yale L. J. 121 (1956). *Concursus* has only been denied by the Second Circuit and the "rule" there is now discussed.

Second Circuit Cases.

The Court below relied principally upon its own decision in *Petition of Texas Co.*, 212 F. 2d 479, C. A. 2, cert. den. 348 U. S. 829. In that case the claims originally made exceeded the fund but, as in the case at bar, the claimants in concert reduced their claims to an aggregate less than the fund for the transparent purpose of avoiding the limitation proceeding. The Court held that a limitation

proceeding can be sustained only where there is need to distribute an inadequate fund.

The Court put considerable emphasis on the provision in Title 46, U. S. Code, Section 184 that the owner of the vessel may take appropriate proceedings "for the purpose of apportioning the sum" *i.e.* the fund, among the parties entitled thereto. Section 184 has remained untouched since 1877. However, Section 185 of Title 46, U. S. Code was amended in 1936 and provides that

> "The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for a limitation of liability within the provisions of this chapter * * *."

Nothing is said in Section 185, as amended in 1936, about apportioning any fund. But the significance attached by the Court to the words of Section 184 was misplaced because Section 185 permits the filing of a petition where there has been no more than written notice of one claim, and there is no requirement that that claim, or the aggregate of the potential claims, exceed the prospective limitation fund.

In view of the six months' requirement of Section 185 the Second Circuit's "rule" could easily deprive a shipowner, otherwise entitled, of the benefit of the statute. Suppose a disaster involving numerous injuries and losses of life, that two claims are filed immediately, but that, deliberately or otherwise, the others are withheld until more than six months have gone by. If the two claims are less than the fund a proceeding for limitation brought within the six months might be dismissed. On the other hand, no proceeding brought after the passage of six months could be sustained because of the provisions of Section 185.

The great bulk of authorities on the question does not seem to have had the Court's attention in *Petition of Texas Co.* The Court cited four cases to support its view. *Curtis Bay Towing Co.* v. *Tug Kevin Moran, Inc.*, 159 F. 2d 273, C. C. A. 2; *Petition of Moran Trans. Corp.*, 185 F. 2d 386 C. A. 2; *Petition of Red Star Barge Line, Inc.*, 160 F. 2d 436, C. C. A. 2 and *The Aquitania*, 14 F. 2d 456, aff'd 20 F. 2d 457 C. C. A. 2.

Two of these cases, *Petition of Moran Trans. Corp.* and *Petition of Red Star Barge Line, Inc.*, were cases where only one possible claim was involved. Single claim cases seem to have little bearing on a case such as this where 11 claims were filed. Such cases are discussed *infra*, pages 25-27.

Curtis Bay Towing Co. v. *Tug Kevin Moran, Inc.* and *The Aquitania* may be discussed together because both involved situations, decidedly different from the present one, where it was *apparent when the petition was filed* that the aggregate of the claims could not even approach the amount of the fund and where it might be said that the petitions were improvidently filed, possibly not in good faith. In the *Curtis Bay* case the value of the petitioner's tug *i.e.* the fund, was $209,000, yet when the petition was filed six months later the amount of the damage was known and it was apparent that it did not exceed $17,000. Meantime suits had been begun in Pennsylvania and it seems to be suggested in the opinion that the petition may have been filed as much to bring the litigation to New York as for any other purpose. The Court by L. Hand, C. J., stated the position for which we contend, *viz.*

> "It is true that limitation proceedings are not merely auxiliaries to the distribution of an inadequate fund among a number of claimants" (p. 275)

but, relying solely upon *The Aquitania*, and apparently without reviewing the great body of authority to the contrary, directed that the restraining order be vacated.

The Aquitania first came before A. N. Hand, then D. J., on a motion to dismiss where the moving parties were less inhibited in stating their ground than were the moving parties in the *Curtis Bay* case, *id.* "that the limitation proceeding is not taken in good faith, because there can be no possible occasion for limiting liability when the claims are so far less than the property to be surrendered" (p. 457). The *Aquitania* had sunk a fishing boat about the size of one of her own life boats. Her owner filed an *interim* stipulation in the amount of $9,225,000. Actions for the deaths of five men who were the crew of the fishing boat had been brought in the aggregate amount of $205,000. Judge Hand considered it significant that the surety on the *interim* stipulation had been allowed by the Federal Treasury and the State Insurance Department to furnish a bond in the amount of $9,225,000 upon the assurance that the liability did not exceed $311,000. In this case some, but by no means all, of the earlier authorities were referred to and the Judge, despite the tremendous disparity between the fund and the aggregate of the claims, refused to grant the motion because the petition was in proper form and the matter relied upon could be set up by answer. However, he referred the matter to a special commissioner to determine whether the claims could possibly equal the fund.

The commissioner reported that the claims could not exceed $210,000 whereupon the Court reaffirmed its earlier view that the statute applies, and it is proper to file a petition, only where there is at least some chance that the claims will exceed the fund. *Petition of Cunard S. S. Co. Ltd.*, 17 F. 2d 120. On appeal the Court affirmed on the same ground. *The Aquitania*, 20 F. 2d 457, C. C. A. 2.

Reflection will make it clear that *The Aquitania* and the *Curtis Bay* cases represent a rule not applicable here. In both cases the propriety of the petition was attacked at the threshold by motion to determine whether the petitions had been filed in good faith. The rule for which those

cases stand may perhaps be stated thus: Where the petitioner at the time of filing the petition knows that the aggregate of all claims cannot possibly equal the value of his interest in the vessel, it will be considered that he does not file in good faith and jurisdiction does not attach. That is a vastly different situation from the one at bar where there can be no doubt that the petitioner in good faith feared that the claims would exceed the fund. Perhaps in the last analysis it can be said that the attaching of jurisdiction depends upon whether or not petitioner seeks the benefit of the statute in good faith. If he does not, *i.e.* if it is reasonably apparent when the petition is filed that the claims cannot exceed the fund, jurisdiction never attaches but if, when the petition is filed, petitioner reasonably and in good faith fears that the aggregate of the claims will exceed the fund, jurisdiction does attach and, once attaching, persists until the entire controversy has been disposed of. Any other result would place the Court's jurisdiction at the whim of the claimant's attorneys, an unseemly situation. The claimants here, by concert, have arbitrarily reduced their claims to just below the maximum limitation fund for the purpose of depriving the Admiralty Court of jurisdiction; in fact the stipulation reducing the claims was presented (and obviously procured) by respondent's attorney. Such maneuvering was not allowed in *Petition of Boraks*, 142 F. Supp. 364.

This is substantially the rule in the diversity cases. In *St. Paul Mercury Indemnity Co.* v. *Red Cab Company*, *supra*, 303 U. S. 283, this Court squarely held that if the claim of jurisdictional amount is "apparently made in good faith" and not "colorable for the purpose of conferring jurisdiction", the amount stated in the complaint is conclusive and "Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction" (pp. 288-90). This is a reasonable and workable rule and is

consistent with all the authorities from *Norwich Company* v. *Wright*, *supra*, 13 Wall. 104, decided in 1872, down to *Petition of Texas Company*, *supra*, 213 F. 2d 479, decided in 1954.

In *Norwich Company* v. *Wright*, *supra*, 13 Wall. 104, this Court held that it was enough that it was

> "* * * * alleged by the libellants [petitioners] that the damage to the schooner and her cargo, together with the damage arising from the loss of the steamer's cargo, greatly exceeds the value of the steamer and her freight for the voyage" (p. 122).

In *The Scotland*, *supra*, 105 U. S. 24, this Court held that the rules were intended to permit the filing of a limitation petition "where they [shipowners] were entitled, *or conceived themselves entitled*, to the law of limited responsibility" (p. 33; italics ours).

Single Claim Cases.

Cases involving only one claim, where no other claim is reasonably possible, are something of an exception to the general rule. Even as to such cases, where there is no need for concourse because there is only one claim, there is no doubt whatever that a limitation proceeding may be brought and will be sustained. *White* v. *Island Transportation Company*, 233 U. S. 346.

The only real difference between single claim cases and multiple claim cases is that in the former the claimant may, in the discretion of the Court, be allowed to proceed to establish liability and the amount of his claim outside the limitation proceeding provided he concedes the vessel owner's right to limitation of liability. In *Langnes* v. *Green*, 282 U. S. 531, Green sued Langnes in the State Court to recover for injuries sustained on the latter's vessel. On the eve of trial Langnes began a limitation proceeding and the District Court issued an order restrain-

ing the prosecution of the State Court action. Green moved to dissolve the restraining order on the ground that the State Court had jurisdiction because there was only one possible claim. This motion was denied and the limitation proceeding went to trial. The Court held that there was no liability and did not reach the question of the right to limitation of liability. Green appealed; the Circuit Court reversed and directed the District Court to dismiss the limitation proceeding for want of jurisdiction. This Court dealt primarily with Green's claim that the shipowner should have sought his limitation by proper pleading in the State Court action because there was only one claim.

This Court questioned whether the petition had been filed in good faith because, in view of the nature of the accident, it seemed that there could not possibly be any other claimant (p. 540). Nevertheless the Court held that the vessel owner was entitled to invoke the limitation act and that the question whether the action at law should be allowed to proceed was one of sound judicial discretion and not a matter of right on the part of the single claimant (pp. 540-1).

The Court remanded the case with directions to allow Green to proceed with the State Court action upon condition that he concede Langnes' right to limitation. Upon the remand Green refused to concede Langnes' right to limit and the District Court refused to modify the restraining order. Thereupon Green moved in this Court for leave to file a petition for writ of mandamus against the District Court to show cause why he should not be allowed to proceed in the State Court. *Ex parte Green*, 286 U. S. 437. This Court maintained its earlier view, held that the District Court was right in refusing to vacate the restraining order while the right to limitation of liabilty was in issue, and denied Green's motion. The Court said:

> "It is clear from our opinion that the State Court has no jurisdiction to determine the question of the

> owner's right to a limited liability, and that if the value of the vessel be not accepted as the limit of the owner's liability, the Federal Court is authorized to resume jurisdiction *and dispose of the whole case*" (pp. 439-440, italics ours).

There is nothing in *Langnes* v. *Green*, or the single claim cases that follow it, that conflicts with the points previously made in this brief.

The fundamental distinction between the single claim and the multiple claim cases is that no concourse is necessary to avoid a multiplicity of trials either on the question of liability or on the question of limitation. Obviously there is no analogy between the single claim case and this one where there are eleven claimants either in or trying to get out of the limitation proceeding. *Concursus* here is required.

IV. The claims in this proceeding exceed the amount of the possible fund and petitioner is entitled to a *concursus* for their disposition.

There is no doubt that where the claims number more than one and exceed the limitation fund petitioner has an absolute right under the statute and decisions of all courts to bring all claims against it into concourse so that the Admiralty Court may, if liability is decreed, distribute an inadequate fund. Even the "rule" evolved in the Second Circuit requires that the aggregate of claims must be *substantially* less than the fund before the restraining order will be relaxed. *Petition of Trinidad Corporation*, 229 F. 2d 423 (2d Cir.); *George J. Waldie Towing Co.* v. *Ricca*, 227 F. 2d 900 (2d Cir.); *Petition of Texas Company*, 213 F. 2d 479 (2d Cir.); *Curtis Bay Touring Co.* v. *Tug Kevin Moran Inc.*, 159 F. 2d 273 (2d Cir.); *Petition of Moran Transportation Corp.*, 185 F. 2d 386 (2d Cir.).

In *Petition of Trinidad Corporation* the claims were less than the fund but not by a margin large enough to satisfy the Court and it refused to relax the restraining order.

In this proceeding the claims aggregate $259,525. But it cannot be said whether the amount of the limitation fund will be $118,500 (tug's value) or $165,000 (barge's value) or $283,000 (value of both) until after there has been a trial on the merits for this reason: Petitioner owned both tug and barge, valued at $118,500 and $165,000 respectively. The limitation fund will consist of the value of only the vessel or vessels individually at fault *in rem*. *Liverpool etc. Nav. Co. v. Brooklyn Eastern District Terminal*, 251 U. S. 48; *The Transfer No. 21*, 248 Fed. 459 (2 Cir.); *Standard Dredging Co.* v. *Kristiansen*, 67 F. 2d 548 (2 Cir.), certiorari denied 290 U. S. 704; *Harbor Towing Corp.* v. *Atlantic Mutual Ins. Co.*, 189 F. 2d 409 (4 Cir.).

The *in rem* liability of a vessel can only be determined by an admiralty court. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *The Moses Taylor*, 4 Wall. (71 U. S.) 411; *The Hine* v. *Trevor*, 4 Wall. (71 U. S.) 555; *The Glide*, 167 U. S. 606; *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109.

Since the amount of the fund cannot be determined until after trial it is not presently possible to say that the fund will exceed the claims and that no concourse will be necessary to distribute an inadequate fund. Obviously, therefore, the decision allowing respondent to proceed in the state court is a complete departure even from the "rule" recently evolved in the Second Circuit.

It is no answer to say that the claims as against the tug have been reduced to an aggregate less than her value and the claims against the barge similarly reduced. By apportioning her claim as between tug and barge respondent does no more than engage not to claim the value of

the barge if the barge is held without fault, or the value of the tug if the tug is held blameless. But this is no concession whatever because it is settled law that if the barge is not individually at fault *in rem* petitioner need not surrender her value; and similarly as to the tug (*supra*, p. 28).

Moreover, the statute deals with claims against the owner, not the vessels themselves.

Section 183(a) says that "The liability *of the owner* * * * shall not * * * exceed the amount or value of the interest of such owner in such vessel * * *."

Section 184 says that the claimants "shall receive compensation *from the owner*" and that it is "the *owner* of the vessel" who "may take appropriate proceedings in any court * * *."

Section 185 says that "*The vessel owner* * * * may petition a district court * * * for limitation of liability" (italics ours).

Since the statute so plainly deals with the liability of the *owner*, and the *owner's* right to bring proceedings to limit that liability, it is patently idle to consider respondent's engagement not to collect any ultimate judgment from the barge if it is held blameless, or from the tug if it is held blameless. She could collect from neither in any event for she has not sued either; nor need she, for petitioner has given adequate bond to pay proved claims up to the value of whichever one, or both, is to be the measure of its liability—if such is decreed.

Claims which respondent asserts are against petitioner's inanimate property, tug and barge, are in truth and in fact claims against petitioner itself, the only juristic person seeking limitation of liability arising out of this collision. The undeniable fact is that, whether allocated to the tug or the barge, or any other piece of petitioner's property, the eleven claims aggregate $259,500. If proved, they will be

paid by petitioner out of its general funds in amounts which substantially exceed the amount at which the limitation fund may be fixed. Therefore it cannot now be said that the fund will be adequate, or that there will be no need to distribute an inadequate fund; hence, even under the Second Circuit "rule", petitioner is entitled to assert its statutory right in this proceeding and to hold respondent and the other claimants therein for the disposition of the entire matter.

A. This Single Proceeding Need Not Be Regarded As If It Were Two.

The foundation upon which the decision of the majority below rests is that they "must" regard this single proceeding as if it were two (R. 61). The language of the statute, Title 46 U. S. Code §§ 183-188, does not impose the constraint felt by the majority and its opinion does not rely upon the statute. The same is true of the Supreme Court Rules, Admiralty Rules 51-54, Title 28 U. S. Code, Rules, which spell out the procedure with considerable particularity. The majority opinion does not rely upon the rules.

The decision of the majority is unprecedented. No prior decision imposes the constraint felt by the majority and it cites none. There are numerous cases in which the courts have dealt with limitation petitions by the owner of two or more vessels without feeling any constraint or embarrassment because separate petitions could have been filed. And this is true both in cases where the value of the second vessel has not been surrendered originally as well as in cases where security has been given for the second vessel but she has not been held liable. *United States v. The Australia Star*, 172 F. 2d 472 (2 Cir.); *Standard Dredging Co. v. Kristiansen*, 67 F. 2d 548 (2 Cir.); *The Transfer No. 21*, 248 Fed. 459 (2 Cir.); *The Bordentown*, 40 Fed. 682 (S. D. N. Y.); *The Captain Jack*, 169 Fed. 455 (D. C. Conn.); *The Alvah H. Boushell*, 38 F. 2d 890 (4

Cir.); *Thompson Towing & Wrecking Ass'n* v. *McGregor*, 207 Fed. 209 (6 Cir.); *The Columbia*, 73 Fed. 226 (9 Cir.).

Moreover, where the owner of two vessels has sought to obtain limitation but surrendered the value of only one, and where, after trial, the courts have found that faults of both contributed, they have not, in any instance we can find, directed that a separate proceeding be begun. On the contrary, they have either ordered that the value of the second vessel be brought into the pending, single proceeding, *United States* v. *Australia Star*, *supra*, 172 F. 2d 472 (2 Cir.); *The Alvah H. Boushell*, *supra*, 38 F. 2d 890 (4 Cir.), or they have dismissed the proceeding entirely. *The San Rafael*, 141 Fed. 270 (9 Cir.).

The reason advanced by the majority for feeling the constraint upon which its decision is based is that the owner "could have" instituted separate proceedings in respect of each vessel, from which it concludes that "The owner can not enlarge its rights under the statute by the mere expedient of coupling the two proceedings" (R. 61). The worst that can be said for petitioner's position is that it had the option to begin a single, or two, proceedings. It exercised its option and began one. That was the exercise of a clear right under the statute and the rules and such advantages as it may gain from the exercise of its right can not justly be taken away. But there is no question of any enlargement of petitioner's rights. It has the unquestioned right under the statute to petition for limitation of liability and it seeks, if held liable at all, only to do what the statute permits it to do in a proper case, viz. limit its liability to the value of its interest in the vessel or vessels at fault. A solution of the problem is not advanced by referring to the filing of a single petition as a "mere expedient".

Without compulsion by statute, rule or precedent, and with the slenderest of reasons, the majority below has laid

down a rule that will largely emasculate the statute where two or more vessels of single ownership are involved. The majority's approach to statutory construction is diametrically contrary to the instructions given by this Court to the lower courts. Uniformly and over a period of 75 years the Court has declared that the statute is to be construed liberally and not grudgingly for the benefit of shipowners. *Norwich Company* v. *Wright*, 13 Wall 104, 121; *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 588-9; *Butler* v. *Boston Steamship Co.*, 130 U. S. 527, 550-1; *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 214-16; *Flink* v. *Paladini*, 279 U. S. 59, 62-3; *Larsen* v. *Northland Transportation Co.*, 292 U. S. 20, 24; *Just* v. *Chambers*, 312 U. S. 383, 385; *Coryell* v. *Phipps*, 317 U. S. 406, 411; *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 414.

This Court has held that the statute itself is only an outline of the plan intended by Congress for the benefit of shipowners and that its full breadth and scope were left to be prescribed by judicial authority. *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, *supra*, 109 U. S. 578, 590. And this Court has, over the span of almost a century, consistently adopted a broad rather than a restrictive interpretation of the statute. As the Court pointed out in *Butler* v. *Boston Steamship Co.*, *supra*, 130 U. S. 527, 550, it was at first contended that the Act did not apply to collisions but this "pretence" was rejected in *Norwich Company* v. *Wright*, 13 Wall 104; and it was next insisted that the Act did not extend to loss by fire, but this restrictive view was rejected in *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578. In the *Butler* case the claim was that the Act did not extend to claims for personal injury and death, but again the Court rejected the narrow construction. In 1881 the Court held that, although the Act did not so provide expressly, it could be invoked by a British shipowner in the case of a collision on the high

seas between his vessel and an American vessel. *The Scotland*, 105 U. S. 24. Years later the Court held that the Act could be invoked by a British shipowner in respect of a disaster suffered by a British ship on the high seas where no American vessel was involved, although the Court had many times said in earlier years that the principal purpose of the Act was to put American shipowners on a parity with foreign shipowners. *The Titanic*, 233 U. S. 718. Indeed, this Court has long since construed the Act so broadly as to hold that it is not limited to maritime torts, *Richardson* v. *Harmon*, 222 U. S. 96, and that it may be availed of by one who is only a stockholder of a corporate shipowner, *Flink* v. *Paladini*, 279 U. S. 59.

B. The Prosecution of Respondent's State Court Action Would Violate the Admiralty Court's Exclusive Jurisdiction of All Questions Affecting Limitation of Liability.

The Admiralty Court has exclusive jurisdiction of all questions affecting limitation of liability. *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578; *In re Morrison*, 147 U. S. 14; *The San Pedro*, 223 U. S. 365; *Hartford Accident and Indemnity Company* v. *Southern Pacific Co.*, *supra*, 273 U. S. 207. And this is true although, in single claim cases, or cases where the fund will exceed the claims, questions of liability and amount of damages may be determined in other Courts. *Langnes* v. *Green*, 282 U. S. 531; *Ex Parte Green*, 286 U. S. 437; *Petition of Red Star Barge Line*, 160 F. 2d 436 (C. C. A. 2); *Petition of Texas Company*, 213 F. 2d 479 (C. A. 2); *Petition of Trinidad Corporation*, *supra*, 229 F. 2d 423 (2 Cir.); *George J. Waldie Towing Co.* v. *Ricca*, *supra*, 227 F. 2d 900, 901 (2 Cir.).

The amount of the limitation fund obviously is at the very heart of limitation and is a matter exclusively for the Admiralty Court. In *Petition of Red Star Barge Line*, *supra*, 160 F. 2d 436 (2 Cir.), the sole claimant in the limi-

tation proceeding was permitted to proceed with her action at law only after she had conceded, among other things, the correctness of the amount of the limitation fund as claimed by petitioner, *i.e.*, she was not allowed to litigate the amount of the fund outside the limitation proceeding.

To the same effect are *W. E. Hedger Transp. Corp.* v. *Gallotta*, 145 F. 2d 870, 872 (2 Cir.); *The Norco*, 66 F. 2d 651, 652 (9 Cir.); *Petition of McAllister Bros.*, 96 F. Supp. 575, 576 (E. D. N. Y.); *The Kearney*, 3 F. Supp. 718, 720-1 (E. D. N. Y.).

Here the District Court thought that the Ulster County jury could "spell out the precise liability that may be imposed with respect to each vessel" (137 F. Supp. 311 at 313). But this would be to allow the jury to determine whether the statutory "vessel" was the tug alone, or the barge alone, or both, and so to fix the value of petitioner's interest in the "vessel". As the cases just cited show, this is so much a part of the shipowner's statutory right as to fall within the exclusive province of the Admiralty Court.

Frank and Clark, C. JJ., say (R. 61-2) that the State Court suit will not interfere with the exclusive admiralty jurisdiction because there can be no "effective determination by the state court of the value of either vessel." But this observation wholly misses the point. It is not a matter of fixing the dollar value of tug and barge but a matter of determining their liabilities. On the District Court's hypothesis the State Court will determine whether petitioner's liability arises from the fault of the tug, or the barge, or both. If such determination is binding it will fix, as between petitioner and respondent, the amount of petitioner's limitation fund because that fund is measured by the yardstick of liability of tug or barge or both. But the cases cited last above demonstrate, and the majority do not deny, that only the Admiralty Court has jurisdiction to fix the amount of the fund. Since the State Court cannot bind the Admiralty Court because the latter has exclusive

jurisdiction to determine the amount of the fund it necessarily follows that the whole State Court action must be nugatory.

Respondent has, as required, stipulated that she "waives any claim of *res judicata* relevant to the issue of limited liability" (R. 54). Therefore, any verdict in the Ulster County action purporting to determine the liability of either tug or barge, or fix its value, is not binding and those questions will have to be litigated again in the Admiralty Court.

Furthermore, so much of the verdict as fixes the amount of appellee's damages will be void as to the other claimants to the fund because they are not parties to the Ulster County action, yet they have a right to contest with appellee, and with each other, all questions of *quantum* of damage. *Petition of Trinidad Corporation, supra*, 229 F. 2d 423, 428 (2 Cir.). The other claimants in this proceeding have not signed stipulations as were required of other claimants in *Petition of Trinidad Corporation, supra* (R. 47-50).

The procedure of special verdict visualized by the District Judge would create such inscrutable problems as to be avoided at almost any cost. Suppose the jury were to hold both tug and barge, fix their aggregate value at $283,000, and fix appellee's damages at $250,000. But suppose also that in the limitation proceeding the Admiralty Court, finding only the tug at fault, enters a decree allowing petitioner to limit its liability to the tug's value, $118,000. Which result prevails; what then is the limit of petitioner's liability? The Admiralty Court will then fix the tug's value as the limitation fund and perpetually enjoin all persons, including respondent, from proceeding against petitioner otherwise than against that fund. The State Court's decision that liability flows from some fault in respect of the barge as well, and its judgment for more than the amount the Admiralty Court fixes as the limit of petitioner's liability

cannot possibly stand. The statute expressly provides that, where lack of privity or knowledge is established, the liability of the owner "shall not * * * exceed the amount or value of the interest of such owner in such vessel". Title 46 U. S. Code § 183(a). But if the jury finds liability on the part of both tug and barge and awards the $250,000 claimed, respondent will seek to issue execution on the judgment against petitioner's bank accounts. Unless enjoined this will certainly result in petitioner's paying more than the value of its interest in the tug held at fault by the Admiralty Court, thus nullifying the statute.

Suppose the Ulster jury holds only the tug and values her at $118,000, but in the limitation proceeding the Federal Court holds both tug and barge. Petitioner has not waived any right to claim *res judicata* as to the decisions of the State Court—and it does not. In this situation the Federal Court fund would be $283,000. The other claimants would collect a maximum of $9,525 and petitioner would have to pay respondent only $118,000 although her damages are $250,000 and there remained $155,475 in the Admiralty Court fund.

For a third possibility, suppose the Admiralty Court holds petitioner not liable but the State Court finds liability. Upon a finding of no liability the Admiralty Court will enter the usual decree of exoneration which incorporates a perpetual restraining order forbidding the prosecution of any and all claims against petitioner arising out of this incident. Either this would prevent respondent from collecting any judgment entered on the State Court's finding of liability, rendering the whole State Court proceedings fruitless, or, if the State Court judgment were collected it would be in contempt of the Admiralty Court's decree and in violation of the mandate of the limitation statute.

The majority of the panel say that this possibility "will present no difficulty" (R. 62). To petitioner the difficulty seems insuperable.

The dissenting judge (Hincks, C. J.) recognized the fruitless result of allowing respondent's State Court action to proceed. After examining the possible results in the State Court he said:

> "Thus considered the disposition of the court, in my view, subjects the parties to the labor and expense of litigation which may prove to be wholly fruitless and nugatory.
>
> That such may prove to be the result, I think, is more than a remote possibility. For that result will follow unless in the state court trial the judge shall require the jury find specially whether the plaintiff's injury (if caused by the owner's negligence) was caused by negligence in its conduct of the tug or by negligence in the barge. * * *. In my opinion, it is by no means unlikely that the judge would refuse a request to require special findings on the grounds that the request if granted would inject into the case an additional issue the solution of which is not essential to the decision of the case under the law of the state. * * *
>
> I deprecate sanction for a procedure whereby indivisible causes of actions and indivisible liabilities may be split and their respective fragments may be litigated in separate proceedings" (R. 67).

Even in the single claim cases, where no concourse is needed because there is only one claim, the claimant is not entitled, as of right, to try the issue of liability in the State Court. Even there it is discretionary with the Admiralty Court whether or not to modify the restraining order. *Langnes* v. *Green, supra,* 283 U. S. 531, and *Ex parte Green, supra,* 286 U. S. 437. Even if, in the case at bar, petitioner were not entitled to a concourse as of right, the court should have exercised its sound judicial discretion and refused to modify the restraining order because there are eleven claimants against a fund that will be large enough to pay all in full only if the barge, which was wholly under the control of the tug, should somehow be held at fault jointly with the tug.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed and the restraining order reinstated.

Dated: New York, N. Y., March 29, 1957.

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Appendix

The Limitation Statute as printed in Title 46 U. S. C. A. provides:

§ 183. **Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel".**

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: Provided, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the Owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d) and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such terms as used in section 188 of this title. (As amended Aug. 29, 1935, c. 804, § 1, 49 Stat. 960; June 5, 1936, c. 521, § 1, 49 Stat. 1479.)

§ 183b. **Stipulations limiting time for filing claims and commencing suit.**

"(a) It shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels and their tenders) transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period for institution of suits to be computed from the day when the death or injury occurred.

(b) Failure to give such notice, where lawfully prescribed in such contract, shall not bar any such claim—

(1) If the owner or master of the vessel or his agent had knowledge of the injury, damage, or loss and the court determines that the owner has not been prejudiced by the failure to give such notice; nor

(2) If the court excuses such failure on the ground that for some satisfactory reason such notice could not be given; nor

(3) Unless objection to such failure is raised by the owner.

(c) If a person who is entitled to recover on any such claim is mentally incompetent or a minor, or if the action is one for wrongful death, any lawful limitation of time prescribed in such contract shall not be applicable so long as no legal representative has been appointed for such incompetent, minor, or decedent's estate, but shall be applicable from the date of the appointment of such legal representative: *Provided, however*, That such appointment be made within three years after the date of such death or injury. (R. S. § 4283A, as added Aug. 29, 1935, c. 804, § 3, 49 Stat. 960.)"

§ 183c. **Stipulations limiting liability for negligence invalid.**

It shall be unlawful for the manager, agent, master or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or

(2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are hereby declared to be against public policy and shall be null and void and of no effect. (R. S. 4283B, as added June 5, 1936, c. 521, § 2, 49 Stat. 1480.)

§ 184. **Apportionment of compensation.** Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto. (R. S. § 4284; Feb. 27, 1877, c. 69, § 1, 19 Stat. 251.)

§ 185. **Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee.**

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to

carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease. (As amended June 5, 1936, c. 521, § 3, 49 Stat. 1480.)

§ 186. **Charterer may be deemed owner.** The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof. (R. S. § 4286.)

§ 187. **Remedies reserved.** Nothing in sections 182-185, or 186 of this chapter shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seamen of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel. (R. S. § 4287.)

§ 188. **Limitation of liability of owners applied to all vessels.**

Except as otherwise specifically provided therein, the provisions of sections 182, 183, 183b-187, and 189 of this

title shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters. As amended June 5, 1936, c. 521, § 4, 49 Stat. 1481.

§ 189. **Limitation of liability of owners of vessels for debts.**

The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: *Provided,* That this provision shall not prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners. (June 26, 1884, c. 121, § 18, 23 Stat. 57.)

The Admiralty rules provide:

Rule 51. Limitation of liability—how claimed

The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the Act of March 3, 1851, entitled "An Act to limit the liability of shipowners and for other purposes" (Sections 183 to 189 of Title 46 of the U. S. Code, 46 U. S. C. A. §§ 183-189) as now or hereafter amended or supplemented, may file a petition in the proper District Court of the United States, as hereinafter specified. Such petition shall set forth the facts and circumstances on which limitation of liability is claimed, and pray proper relief in that behalf. It shall also state facts showing that the petition is filed in the proper district; the voyage on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort, arising on that voyage,

so far as known to the petitioner, and what suits, if any, are pending thereon; whether the vessel was damaged, lost or abandoned, and, if so, when and where: the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If any of the above particulars are not fully known to the petitioner, a statement of such particulars according to the best knowledge, information, and belief of the petitioner shall be sufficient. With his petition the petitioner may, if he so elects, file an interim stipulation, with sufficient sureties or an approved corporate surety, for the payment into court whenever the court shall so order, of the aggregate amount of the value of petitioner's interest in the vessel at the close of the voyage or, in case of wreck, the value of the wreckage, strippings or proceeds, and of any pending freight recovered or recoverable, with interest at six percent per annum from the date of the stipulation, and costs. If such interim stipulation is filed, it shall be accompanied by an affidavit or affidavits of a competent person or persons corroborating the statement in the petition as to value of the vessel, or her wreckage, etc., and her freight. Said court, having caused due appraisement to be had of the value of petitioner's interest in the vessel, or her wreckage, etc., and her freight shall make an order for the payment of the same into court, or for the giving of a stipulation, with sufficient sureties or an approved corporate surety, for the payment thereof into court with interest at six percent per annum from the date of the stipulation, whether interim or final, and costs, whenever the same shall be ordered; or, if the petitioner shall so elect, the court without such appraisement shall make an order for the transfer by the petitioner of his interest in such vessel, or her wreckage, etc., and freight to a trustee to be appointed by the court under the fourth section of said Act.

If a surrender of petitioner's interest in the vessel or her wreckage, etc., is offered to be made to a trustee, the petition must further show any prior, paramount liens thereon, and what voyage or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

Upon the filing of such interim stipulation, or upon determination of value by appraisal and compliance with the court's order with respect thereto, or upon compliance with a surrender order, as the case may be, the court shall issue a monition against all persons asserting claims in respect to which the petition seeks limitation, citing them to file their respective claims with the Clerk of said court and to serve on or mail to the proctors for the petitioner a copy thereof on or before a date to be named in said writ which shall be not less than 30 days after issuance of the same, which time the court, for cause shown, may enlarge.

Notice of the monition shall be published in such newspaper or newspapers as the court by rule or order may direct in substantially the following form, once in each week for four successive weeks before the return day of the monition:

United States District Court

District of .....

Notice of Petition for Exoneration from or Limitation of Liability

(Filed .....)

Notice is given that ..... has filed a petition pursuant to Title 46, U. S. Code, §§ 183-189, 46 U. S. C. A. §§ 183-189, claiming the right to exoneration from or limitation

of liability for all claims arising on the voyage of the vessel ..... from ..... to ..... terminating on .....

All persons having such claims must file them, under oath, as provided in United States Supreme Court Admiralty Rule 52, with the Clerk of this Court, at the U. S. Court House at ..... and serve on or mail to the petitioner's proctors ..... at ..... a copy on or before ..... or be defaulted. Personal attendance is not required.

Any claimant desiring to contest the claims of petitioner must file an answer to said petition, as required by Supreme Court Admiralty Rule 53, and serve on or mail to petitioner's proctors a copy.

.....

U. S. Marshal.

The petitioner not later than the day of second publication shall also mail a copy of the above notice (copy of the monition need not be mailed) to every person known to have made any claim against the vessel or the petitioner arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice, together with a copy of Rule 52, shall be mailed to the decedent at his last-known address, and also to any person who shall be known to have made any claim on account of such death.

The said court shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect to any claim or claims subject to limitation in the proceeding. Amended June 21, 1948.

Rule 52. Filing and proof of claim in limited liability proceedings

Claims shall be filed with the Clerk of the Court in writing under oath and a copy shall be served upon the proctor for the petitioner on or before the return day of the monition. Each claim shall specify the various allegations of fact upon which the claimant relies in support of his claim, the items thereof, and the dates on which the same accrued. Within thirty days after the return day of the monition or within such time as the Court thereafter may allow, the petitioner shall mail to the proctor for each claimant (or if the claimant have no proctor to the claimant himself) a list setting forth (a) the name of each claimant, (b) the name and address of his proctor or attorney (if he is known to have one), (c) the nature of his claim, i. e., whether property loss, property damage, death, personal injury, etc., and (d) the amount thereof.

Whenever an interim stipulation has been filed as provided in Rule 51, any person claiming damages as aforesaid, who shall have filed his claim under oath, may file an exception controverting the value of the vessel at the close of the voyage, or, in case of wreck, the value of her wreckage, strippings or proceeds, and the amount of her pending freight, and the amount of the interim stipulation based thereon, and thereupon the court shall cause due appraisement to be had of the value of petitioner's interest in the vessel, or her wreckage, etc., and her freight; and if the court finds that the amount of the interim stipulation is either insufficient or excessive, the court shall make an order for the payment of the proper amount into court or, as the case may be, for a reduction in the amount of the stipulation or for the giving of an additional stipulation.

Proof of all claims which shall be filed in pursuance of said monition shall thereafter be made before a commissioner to be designated by the court, or before the court as the court may determine, subject to the right of any

person interested to question or controvert the same; but no objection to any claim need be filed by any party to the proceedings; and on the completion of said proofs, the commissioner shall make report, or the court its findings on the claims so proven, and no confirmation of said commissioner's report, after hearing any exceptions thereto, or on such finding by the court, the moneys paid or secured to be paid into court as aforesaid or the proceeds of said vessel, or her wreckage, etc., and freight (after payment of costs and expenses) shall upon determination of liability be divided pro rata, subject to all provisions of law thereto, appertaining, amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled. Amended June 21, 1948.

Rule 53. Rights of owner to contest liability and of claimants to contest exoneration from liability or limitation of liability of owner

In the proceedings aforesaid, the petitioner shall be at liberty to contest his liability, or the liability of said vessel, provided he shall have complied with the requirements of Rule 51 and shall also have given a bond for costs and provided that in his petition he shall state the facts and circumstances by reason of which exoneration from liability is claimed; and any person claiming damages as aforesaid who shall have filed his claim under oath and intends to contest the right to exoneration or limitation, shall file an answer to such petition, and serve a copy on proctor for petitioner, and may contest the right of the owner or owners of said vessel, either to an exoneration from liability or to a limitation of liability under the said Act of Congress, or both, provided such answer shall in suitable allegations state the facts and circumstances by reason of which liability is claimed or right to limitation should be denied. Amended June 21, 1948.

Rule 54. Courts having cognizance of limited liability procedure

The said petition shall be filed and the said proceedings had in any District Court of the United States in which said vessel has been libeled to answer for any claim in respect to which the petitioner seeks to limit liability; or, if the said vessel has not been libeled, then in the District Court for any district in which the owner has been sued in respect to any such claim. When the said vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner, the said proceedings may be had in the District Court of the district in which the said vessel may be, but if said vessel is not within any district and no suit has been commenced in any district, then the petition may be filed in any District Court. The District Court may, in its discretion, transfer the proceedings to any district for the convenience of the parties. If the vessel shall have already been sold, the proceeds shall represent the same for the purposes of these rules. Amended June 21, 1948.

Rule 55. Appeals in limited liability cases

All the preceding rules and regulations for proceeding in causes where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf, shall apply to the Circuit Courts of Appeals of the United States where such cases are or shall be pending in said courts on appeal from the District Courts.